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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CORUS STAAL BV AND
CORUS STEEL USA INC.,

Petitioners,

v.

DEPARTMENT OF COMMERCE *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the decision below, the Federal Circuit deferred, under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Department of Commerce's conclusion that an ambiguous statute permits a methodology known as "zeroing" to determine a foreign company's liability for "dumping"—*i.e.*, selling goods into the United States at prices lower than those at which it sells the same goods in its home market. The Federal Circuit deferred to this interpretation notwithstanding that (1) the statute was amended in 1994 to ensure that the United States complies with its obligations under the Uruguay Round Agreements, and (2) the World Trade Organization (WTO) entity empowered to interpret that multi-lateral treaty has ruled that "zeroing" violates the treaty. The questions presented are:

1. Whether the court of appeals erred in deferring to an agency interpretation of a statute where that interpretation places the United States in direct violation of its obligations under a multi-lateral treaty and where a Binational Panel that Congress established under the North American Free Trade Agreement has held the agency's interpretation is unlawful;

2. Whether the court of appeals erred by ruling, in conflict with another circuit, that an agency interpreting an ambiguous statute lacks discretion to employ the *Charming Betsy* canon of statutory construction to ensure U.S. compliance with international legal obligations where the statute does not expressly include, as part of its list of decisional criteria, consideration of such international legal obligations; and

3. Whether the court of appeals erred by ruling that the "foreign policy" implications of antidumping determinations and the statutory mechanisms for ensuring future compliance with an adverse WTO finding preclude judicial review of a claim that U.S. law, interpreted in accordance with the *Charming Betsy* canon, prohibits imposition of such treaty-violating determinations.

PARTIES TO THE PROCEEDING

Petitioners are Corus Staal BV, a Dutch manufacturer of steel and other products, and its wholly-owned U.S. subsidiary, Corus Steel USA Inc.

Corus Staal BV is 100% owned by Corus Investment BV, which is 100% owned by Koninklijke Hoogovens NV (now Corus Nederland BV), which is 100% owned (through its ownership interests in Corus CNBV Investments BV (19%) and Corus Property Ltd. (81%)) by Corus Group plc, a publicly owned company whose shares are listed on the New York, London, and Amsterdam stock exchanges.

Corus Steel USA Inc. is 100% owned by Koninklijke Hoogovens NV (now Corus Nederland BV), which in turn is 100% owned (through ownership interests in Corus CNBV Investments BV (19%) and Corus Property Ltd (81%)) by Corus Group plc.

Respondents are the United States Department of Commerce and the National Steel Corporation. Bethlehem Steel Corporation, United States Steel Corporation, Steel Dynamics, Inc., Ipsco Steel, Inc., Gallatin Steel Company and Nucor Corporation were defendants below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Corus Staal BV, and Corus Steel USA Inc. ("Corus") respectfully seek a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 395 F.3d 1343 (Fed Cir. 2005) (Pet. App. 1a-10a). The order of the court of appeals denying the petition for rehearing and rehearing en banc (Pet. App. 61a-62a) is unreported.

The opinions of the United States Court of International Trade are reported at 283 F. Supp. 2d 1357 (Ct. Int'l Trade 2003) (Pet. App. 11a) and 259 F. Supp. 2d 1253 (Ct. Int'l Trade 2003) (Pet. App. 12a-46a).

The final determination of the U.S. Department of Commerce is reported at 66 Fed. Reg. 50,408 (Oct. 3, 2001), *as amended* 66 Fed. Reg. 55,637 (Nov. 2, 2001) (Pet. App. 47a-60a).

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2005. On May 18, 2005, the court of appeals entered an order denying Corus's timely motion for a rehearing and rehearing en banc. Pet. App. 61a-62a. On July 28, 2005, the Chief Justice granted the application of petitioners to extend the time for filing a petition for writ of certiorari to and including September 15, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 731(1), 771(34), 771(35) and 773 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1673(1), 1677(34)-(35), 1677b(a), defining the manner in which dumping margins are to be imposed, and Sections 123 and 129 of the Uruguay Round Agreements Act, 19 U.S.C. §§ 3533(g) and 3538(b)-(c), setting forth procedures that govern the United States' response to an adverse ruling of the World Trade Organization's Dispute Settlement Body, are reproduced in Pet. App. 84a-95a.

STATEMENT OF THE CASE

Congress has created two review mechanisms for decisions of the Department of Commerce in antidumping cases. Most such decisions, including the one at issue in this case, may be challenged through an action before the United States Court of International Trade, 19 U.S.C. § 1516a(a), with appellate review in the Federal Circuit. 28 U.S.C. § 1295(a)(5). In the case of merchandise imported from Canada or Mexico, however, the Department's antidumping orders may be reviewed by Binational Panels under Chapter 19 of the North American Free Trade Agreement (NAFTA). See 19 U.S.C. § 1516a(g).

As a result of the decision below, there is a square conflict between a Binational Panel and the Federal Circuit concerning the proper interpretation of the term "dumping margin" in the Tariff Act of 1930, as amended, which incorporates a requirement that such margins be based on a "fair comparison" of certain transactions. In the decision below, the Federal Circuit deferred, under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to a Department interpretation of this term that places the United States in violation of its obligations under a treaty. Although the ambiguous statutory language the Department interpreted was designed to ensure U.S. compliance with a

multi-lateral treaty, the lower court ratified an interpretation that has been deemed violative of the treaty by the international body responsible for authoritatively interpreting the treaty's terms.

In contrast, a Binational Panel recently rejected the Department's interpretation of the same statutory language. The Binational Panel recognized that, when an agency interprets an ambiguous statute that implicates the United States' international legal obligations, the agency's discretion must be limited by the time-honored maxim that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The Binational Panel found that where, as here, a Department interpretation is inconsistent with U.S. treaty obligations, the *Charming Betsy* doctrine renders that interpretation unreasonable and not in accordance with law. Thus, the happenstance of forums has resulted in the imposition of different liabilities upon importers into the United States that are subject to the same statutory standards.

The fact that the Federal Circuit has affirmed an agency interpretation that has been rejected by the only other body with authority to review that interpretation is itself a sufficient reason to justify review of the decision below. That the Department's interpretation will cause the United States to violate its obligations under a treaty only underscores the need for such review. The decision below, however, warrants review for two additional reasons.

First, the lower court's ruling creates a broader doctrinal split among the circuits over the role the *Charming Betsy* canon should play in cases involving *Chevron* deference. The D.C. Circuit has concluded that the *Charming Betsy* doctrine affords an agency the discretion to implement an ambiguous statute in a manner consistent with the Nation's international legal obligations, even when Congress has not included this principle in a list of statutorily specified factors the agency

must consider. In the decision below, however, the Federal Circuit reached precisely the opposite conclusion—ruling that the Tariff Act's specification of factors to be considered when determining dumping margins deprives the Department of discretion to interpret the statute in a manner that does not violate U.S. treaty obligations. The proper role of the *Charming Betsy* doctrine in cases involving *Chevron* deference is an extremely important one, not only in the area of trade regulation, but also in a variety of contexts—such as pollution control, importation of animal products, and removal of aliens—where compliance by the United States with international agreements is governed by domestic statutes interpreted and applied by administrative agencies.

Second, in justifying its refusal to consider whether the *Charming Betsy* canon rendered the Department's interpretation unreasonable, the lower court concluded that it is the "exclusive duty" of the Executive Branch to decide whether to exercise its interpretive discretion in a manner that violates U.S. international obligations. The Federal Circuit purported to find a delegation of such unreviewable discretion in provisions that set forth the procedures the Executive Branch must follow when deciding whether and how to implement any adverse ruling of the World Trade Organization's Dispute Settlement Body. These provisions, however, delegate no such authority to the Executive Branch. The Federal Circuit's contrary ruling abdicates judicial responsibility to ensure that federal agencies act in accordance with congressional mandates, thereby impermissibly denigrating Congress's role as the Nation's primary speaker in the area of foreign commerce.

A. The Statutory Framework.

"Dumping" involves international price discrimination whereby an exporter sells its merchandise in the country of importation at prices lower than those at which it sells the

same goods in its home market.[1] In certain circumstances, the importing country may respond to dumping by imposing "antidumping duties" on the offending imports. In the United States, the antidumping regulatory framework is embodied in the Tariff Act of 1930. The Tariff Act defines "dumping" as "the sale or likely sale of goods at less than fair value," 19 U.S.C. § 1677(34), and provides that, when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and when those sales are found to cause or threaten to cause "material injury" to an industry in the United States, antidumping duties shall be imposed on imports of that foreign merchandise. *Id.* § 1673.

The Department of Commerce administers the antidumping law. *Id.* § 1677(1). The Tariff Act directs the Department to determine whether foreign merchandise is being sold in the United States at "less than its fair value." *Id.* § 1673(1). To do this, the Department must compare the prices at which the merchandise is sold in this country (identified as either the "export price" or "constructed export price"[2]) with the "normal value" of the subject merchandise, typically measured as the price at which the merchandise is sold in the exporter's or manufacturer's home market. *Id.* § 1677b(a). The difference, or "dumping margin," is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *Id.* § 1677(35)(A). The Department then calculates a "weighted average dumping margin," which is defined as

> the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or

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[1] *See* Jacob Viner, *Dumping: A Problem in International Trade* 4 (August M. Kelley 1996) (1922) ("price-discrimination between purchasers in different national markets" is the "essential characteristic of dumping").

[2] *See* 19 U.S.C. § 1677a(a), (b).

> producer by the aggregate export prices and constructed export prices of such exporter or producer.

Id. § 1677(35)(B).

Congress amended the process of determining "dumping margins" in 1994, after the United States became a signatory to the *Uruguay Round Agreements* that established the World Trade Organization ("WTO"), including the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Marrakesh Agreement Establishing the WTO, Annex 1A (Apr. 15, 1994) (the "Anti-Dumping Agreement" or "AD Agreement").[3] Article 2.4 of the AD Agreement provides:

> *[a] fair comparison shall be made between the export price and the normal value.* This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.

Pet. App. 150a (emphasis added). And Article 2.4.2 provides, in relevant part, that

> *[s]ubject to the provisions governing fair comparison in paragraph 4*, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all* comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.

Id. at 151a-152a (emphases added).

To ensure compliance with these requirements, Congress adopted the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) ("URAA"). Of particular

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[3] *Reprinted in* H.R. Doc. No. 103-316, vol. I, at 1453-77 (1994) (relevant portions reproduced in Pet. App. 150a-152a).

relevance here, Congress, using virtually the same language, incorporated the treaty's "fair comparison" requirement into domestic law. Thus, as amended by the URAA, the Tariff Act provides that

> "[i]n determining . . . whether subject merchandise is being, or is likely to be, sold at less than fair value, *a fair comparison shall be made* between the export price or constructed export price and normal value."

19 U.S.C. § 1677b(a) (emphasis added). It further provides that, "[i]n order to achieve a fair comparison with the export price or constructed export price," normal value shall be determined as described in the subsequent subsections of the statute. *Id.*

In the Statement of Administrative Action ("SAA") that Congress and the Executive Branch issued in conjunction with the enactment of the URAA,[4] Congress confirmed its incorporation of the treaty's "fair comparison" requirement into domestic law. The SAA—which Congress made, by statute, the "authoritative expression by the United States concerning the interpretation and application of [the URAA] . . . in any judicial proceeding," 19 U.S.C. § 3512(d)—expressly states that the "requirement of Article 2.4 of the Agreement that a fair comparison be made between the export price or constructed export price and normal value is stated in and implemented by section [1677b]." SAA at 820, Pet. App. 156a.[5] Indeed, the SAA notes that the URAA was "intended to bring U.S. law fully into compliance with

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[4] Statement of Administrative Action, in *Message from the President Transmitting the Uruguay Round Trade Agreements*, H.R. Doc. No. 103-316, vol. I, at 656-1045 (1994) (relevant portions reproduced in Pet. App. 153a-157a).

[5] *Accord*, S. Rep. No. 103-412, at 67 (1994) ("[a]mended section [1677b(a)] incorporates the requirement of Article 2.4 of the Antidumping Agreement that *a fair comparison be made* between the export price or constructed export price and the normal value") (emphasis added).

U.S. obligations under [the Uruguay Round] agreements." *Id.* at 669, Pet. App. 154a.

B. The Department's "Zeroing" Practice.

In the administrative investigation that underlies this case, the Department employed a methodology known as "zeroing" when calculating Corus's weighted average dumping margins. For many of Corus's U.S. transactions in the period covered by the investigation, the legally relevant export prices were *higher* than their normal value, which means that those transactions involved no dumping, or price discrimination. In the trade field, such sales are said to generate a "negative dumping margin." The Department's practice, however, has been to assign a negative margin a value of zero in calculating the "aggregate dumping margins" that, under 19 U.S.C. § 1677(35)(B), comprise the numerator of the fraction used to calculate a party's "weighted average dumping margin."

A simple example illustrates the practice of zeroing and its dramatic effect. Assume that only two U.S. sales of the subject merchandise occurred during the relevant period, one with a U.S. price, after adjustment, of $600, and the other with a U.S. price of $400. Assume further that the normal value in each case is $500. Thus, the first transaction has a dumping margin of -$100, and the second has a dumping margin of $100. Under the Department's zeroing practice, the -$100 would be converted to zero, and the weighted average dumping margin would be calculated as follows:

$$\frac{0 + \$100}{\$600 + \$400} = 10 \text{ percent}$$

If the full effect of the negative dumping margin transaction were considered, however, the weighted average dumping margin would be:

$$\frac{-\$100 + \$100}{\$600 + \$400} = 0 \text{ percent}$$

Zeroing thus creates an inherent "statistical bias" in favor of inflating dumping margins (or even finding the existence of dumping margins where they would not otherwise exist).

> By zeroing negative margins Commerce will find that some dumping occurred if any U.S. sales were made below the average [normal value]. "This will be true even if the vast majority of sales made by the subject foreign producers in the United States were at prices higher than the average [normal value]."

Bowe Passat Reinigungs- und Waschereitechnik GmbH v. *United States*, 20 CIT 558, 570-71, 926 F. Supp. 1138, 1149-50 (1996) (quoting Ronald A. Cass & Stephen J. Narkin, *Antidumping and Countervailing Duty Law: The United States and the GATT*, in *Down in the Dumps*, 200, 205 (Boltuck & Litan eds., 1991)).

C. The Incompatibility Of Zeroing With The Anti-Dumping Agreement.

The practice of zeroing has repeatedly been found by the WTO to violate the AD Agreement. In the *EC – Bed Linen* dispute, both a dispute settlement panel and the WTO Appellate Body found that the practice, when performed by the European Communities, violated Articles 2.4 and 2.4.2 of the AD Agreement.[6] The Appellate Body stated that

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[6] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/141/R (circulated Oct. 30, 2000) ("*EC – Bed Linen Panel Report*"); Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (adopted Mar. 1, 2001) ("*EC – Bed Linen*") (excerpts attached hereto as Pet. App. 136a-149a). Under the Uruguay Round Agreements, Member States can request that a dispute over AD Agreement obligations be handled by a "panel," an ad hoc body consisting of three members. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 1654-78 (1994). Panel decisions can be appealed to the Appellate Body, a seven-member standing body, three of whom serve in any one case. Only the Dispute Settlement Body, which consists of all

> a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of "zeroing" in this dispute—is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.

Pet. App. 143a (¶ 55).

The incompatibility of the Department's zeroing practice with the AD Agreement was recently reaffirmed by the Appellate Body's decision in the *US – Softwood Lumber* dispute, issued on August 11, 2004. Relying on its determination in *EC – Bed Linen*, the Appellate Body in *US – Softwood Lumber* found that the Department's zeroing practice is inconsistent with the AD Agreement:

> We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation without aggregating *all* of the "results" of the multiple comparisons for *all* product types. There is no textual basis under Article 2.4.2 that would justify taking into account the "results" of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other "results". If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.[7]

WTO Member States, can reject a decision of Appellate Body, and then only by unanimous vote.

[7] Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, ¶ 98 (Aug. 11, 2004), Pet. App. 132a ("*US – Softwood Lumber*").

D. Administrative Proceedings Below.

This case arises from an investigation that the Department initiated for sales of hot-rolled steel products from the Netherlands and several other countries during the period of October 1, 1999 through September 30, 2000. On May 3, 2001, the Department issued a preliminary determination in which, using "zeroing," it calculated Corus's weighted average dumping margins at 2.44 percent.[8] If the Department had not used "zeroing," Corus would have had no dumping margin at all. Thus, by zeroing, the Department created antidumping liability where none otherwise would have existed.

Corus informed the Department that the practice of zeroing had been declared inconsistent with the AD Agreement in *EC – Bed Linen*, and argued that the Department should not have used zeroing when calculating Corus's weighted average dumping margins. In its *Final Results*, the Department rejected that argument, and calculated a dumping margin of 2.59 percent. Pet. App. 53a. In the Final Decision Memorandum that accompanied the *Final Results*,[9] the Department stated that zeroing was "required by U.S. law," and that this requirement:

> take[s] precedence over any potentially conflicting obligations under the Uruguay Round Agreements. The [URAA] makes clear that if there is a conflict between U.S. law and any provision of the WTO Uruguay Round Agreements, U.S. law prevails. . . . Moreover, the SAA

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[8] Notice of Preliminary Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 Fed. Reg. 22146, 22151 (May 3, 2001).

[9] The Department issues, with its final results in antidumping proceedings, a memorandum that explains its decisions on issues raised by the parties. In this case, the Department's discussion of the zeroing issue is found in the Final Decision Memorandum (Oct. 3, 2001) (excerpts attached at Pet. App. 63a-68a).

> specifically provides that "[r]eports issued by panels or the Appellate Body . . . have no binding effect under the law of the United States." SAA at 1032. . . . Finally, the Bed Linens Panel and Appellate Body decisions concerned a dispute between the European Union and India. We have no WTO obligation to act based on these decisions.

Final Decision Memorandum at Comment 1 (Pet. App. 68a) (citation omitted) (third alteration in original).

E. Legal Proceedings.

Corus sought review of the Department's determination in the U.S. Court of International Trade. See 19 U.S.C. §§ 1516a(a)(2)(A), (B)(iii); 28 U.S.C. § 1581(c). That court upheld the Department's use of zeroing as a reasonable interpretation of an ambiguous statute. Pet. App. 12a-46a. Following a remand to the Department to resolve issues not pertinent here, the Court of International Trade entered a final judgment upholding the Department's decision. *Id.* at 11a.

The Federal Circuit affirmed. Pet. App. 1a-10a. At the outset, it rejected Corus's argument that this case was not controlled by the decision in *Timken Co.* v. *United States*, 354 F.3d 1334 (Fed. Cir.), *cert. denied*, 125 S. Ct. 412 (2004), which had upheld the Department's use of zeroing as a reasonable interpretation of the ambiguous definition of the term "dumping margin" in 19 U.S.C. § 1677(35)(A). *Timken* involved an administrative review of an earlier antidumping duty order, 354 F.3d at 1338-39, rather than an antidumping investigation, and, as the Federal Circuit acknowledged, the determinations the Department must make in each proceeding "differ between investigations and reviews." Pet. App. 6a. Nevertheless, the court found that these differences were "of no consequence," and that zeroing is no less permissible in the context of administrative investigations than it is in administrative reviews. *Id.*

The Federal Circuit likewise rejected Corus's argument that, under the *Charming Betsy* doctrine, the Department's interpretation was unreasonable because it placed the United States in violation of its obligations under the AD Agreement. Pet. App. 7a-8a. As it had in *Timken*, the lower court reasoned that, because the statute set forth a series of requirements for calculating the normal value used to make the fair comparison, § 1677b(a) could not "create additional limitations on the calculation of dumping margins" in addition to or "beyond those explicitly established in the statute." *Id.*

The Federal Circuit then dismissed the WTO's authoritative interpretation of the AD Agreement in *Softwood Lumber*. The court deemed it significant that Congress had "authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation." Pet. App. 9a. The decision in *Softwood Lumber*, the court reasoned, was "nonbinding because the finding therein was not adopted as per Congress's statutory scheme." *Id.* Indeed, the lower court held that it lacked authority even to consider Corus's *Charming Betsy* argument. Because the conduct of foreign relations "'is committed by the Constitution to the political departments,'" *id.* (quoting *United States* v. *Pink*, 315 U.S. 203, 222-23 (1942)), the court concluded that resolving a statutory ambiguity with "the foreign policy implications of a dumping determination" was a duty "that fall[s] within the exclusive province of the political branches." *Id.* at 10a. It therefore "refuse[d] to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme." *Id.*

The Federal Circuit denied Corus's petition for rehearing and rehearing en banc without opinion. Pet. App. 61a-62a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition in order to resolve a direct conflict over the proper interpretation of the statutory definition of the fundamental term "dumping margin" in 19 U.S.C. § 1677(35)(A). The Federal Circuit's erroneous refusal to employ the *Charming Betsy* doctrine when reviewing the Department's interpretation of ambiguous statutory language is directly at odds with the reasoning of, and the result reached by, a NAFTA Binational Panel reviewing the same agency interpretation of the same statutory provision under the same standard of review. Moreover, the lower court's failure to employ the *Charming Betsy* doctrine in its *Chevron* analysis (as the Binational Panel did) has placed the United States in violation of its obligations under a multi-lateral treaty—despite Congress's indisputable intent to ensure U.S. compliance with that very treaty—and exposes hundreds of companies to billions of dollars of dumping duties they would not owe under a treaty-compliant calculation.

While this direct conflict and resulting treaty violation are alone sufficient to justify review, the decision below also creates a larger doctrinal split over the role of the *Charming Betsy* doctrine in cases involving *Chevron* review of agency interpretations of ambiguous statute. The Federal Circuit's refusal to employ that doctrine to avoid a violation of international obligations conflicts not only with the decision of a Binational Panel, but also with a decision of the D.C. Circuit. In stark contrast to the decision below, the D.C. Circuit has held that an ambiguous statute's specification of decisional criteria does not preclude consideration of the *Charming Betsy* canon. Accordingly, this Court should grant the petition in order to clarify the interplay of that canon and *Chevron* review of agency interpretations that directly affect U.S. international obligations.

Finally, the Federal Circuit's extraordinary conclusion that it was wholly without authority even to consider whether the Department's interpretation ran afoul of U.S. treaty obligations confirms the necessity of plenary review. The implementation procedures cited by the Federal Circuit in no way stripped the lower court of its responsibility to employ well-settled canons of statutory interpretation to determine Congress's intent with respect to the relevant provisions of the Tariff Act. By concluding otherwise, the lower court abdicated its responsibility to ensure that agency action is consistent with Congress's will, thereby improperly diluting Congress's authority to speak as the United States' primary voice on matters of foreign commerce, and erroneously amplifying the voice of the Executive Branch on such matters.

I. THE DECISION BELOW CONFLICTS WITH A BINATIONAL PANEL DECISION AND PLACES THE NATION IN VIOLATION OF ITS TREATY OBLIGATIONS.

A. The Decision Below Cannot Be Reconciled With A Binational Panel's Disposition Of The Same Legal Issue.

The decision below conflicts with a Binational Panel decision rendered less than a month after the Federal Circuit denied rehearing in this case. Reviewing precisely the same statutory interpretation as that reviewed by the Federal Circuit, the Binational Panel employed the *Charming Betsy* canon to reach a result flatly at odds with the result in this case.

At the same time that Canada was challenging the Department's use of zeroing before the WTO in the *Softwood Lumber* dispute, the adversely affected Canadian companies sought Binational Panel review of the antidumping order that the Department had issued based on zeroing. The Panel initially upheld the Department's interpretation, but noted that

a finding by the WTO that the U.S. practice of zeroing was inconsistent with the AD Agreement "would . . . implicate the *Charming Betsy* doctrine."[10] Thereafter, the WTO made precisely such a finding. While the case was on remand from the Panel for resolution of unrelated issues, the WTO Appellate Body issued its decision in *US – Softwood Lumber*, ruling that the Department had in fact violated the AD Agreement by applying zeroing in the very same antidumping order that the Binational Panel was reviewing. Accordingly, the Canadian parties asked the Panel to reconsider its prior ruling in light of the Appellate Body's decision.

The Binational Panel agreed to do so, and found, based on the *Charming Betsy* canon, that zeroing was unlawful under U.S. law. The Panel noted the Federal Circuit's decision in *Timken*, but observed that *Chevron* is "not the only test a court or panel applies in reviewing a challenged agency interpretation of an ambiguous statute."[11] "An otherwise permissible agency interpretation (i.e. one that passes *Chevron*) which conflicts with a U.S. international obligation is, absent a clear legislative command, contrary to law." *Binational Panel Final Determination* at 25, Pet. App. 102a (citing *Charming Betsy*). The Panel explained that, contrary to the Federal Circuit's pronouncements in this case, the applicability of the *Charming Betsy* canon does not depend on whether WTO Appellate Body decisions were "binding." The *Softwood Lumber* decision did "not itself cause the challenged United States measure (zeroing) to be in conflict with the Antidumping Agreement," but rather established

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[10] Article 1904 Binational Panel Report, *Certain Softwood Lumber Products From Canada* Secretariat File No. USA-CDA-2002-1904-02, slip op. at 60 n.68 (July 17, 2003).

[11] Article 1904 Binational Panel Report, *Certain Softwood Lumber Products From Canada: Final Affirmative Antidumping Determination*, Secretariat File No. USA-CDA-2002-1904-02, slip op. at 25 (June 9, 2005), Pet. App. 102a ("*Binational Panel Final Determination*") (excerpts attached at Pet. App. 96a-120a).

"with considerable authority that the measure is so in conflict, which makes application of *Charming Betsy* more assuredly correct." *Id.* at 27, Pet. App. 104a. The Panel thus found "that the application of zeroing in this [*Softwood Lumber*] investigation is inconsistent with a United States international obligation and, by application of the *Charming Betsy* doctrine, [is] unreasonable and not in accordance with law." *Id.* at 43-44, Pet. App. 120a. It therefore retroactively invalidated the Department's use of zeroing in calculating the Canadian companies' dumping margins.

The Binational Panel decision directly conflicts with the decision below. The Panel held that, because it is inconsistent with U.S. international legal obligations, the Department's interpretation of the term "dumping margin" is unreasonable and not in accordance with law. Applying precisely the same standard of review, the Federal Circuit upheld the Department's interpretation as lawful.

These two decisions cannot be reconciled. The Panel suggested that the Federal Circuit had not resolved the *Charming Betsy* issue in this case because of the preclusive effect the court ascribed to Sections 123 and 129 of the Tariff Act, 19 U.S.C. §§ 3533, 3538, which govern U.S. responses to adverse WTO findings. *Binational Panel Final Determination* at 27-28, Pet. App. 104a-105a. Even if this were true, it does not alter the fact that the two tribunals reached fundamentally inconsistent conclusions about the lawfulness of the Department's interpretation. In all events, it is clear for at least two reasons that the Federal Circuit *did* resolve the *Charming Betsy* issue in this case, and did so in a manner completely at odds with the Panel's disposition of the same issue.

First, the court concluded that the statute's specification of factors the Department was to consider in calculating "normal value" precluded application of the *Charming Betsy* canon. Pet. App. 7a-8a. That rationale in no way depends on the supposedly preclusive effect of the Section 123/129

implementation processes. Indeed, in *Timken*, the Federal Circuit rejected application of the *Charming Betsy* canon on precisely this theory, without even mentioning Sections 123 or 129. See 354 F.3d at 1343-44. By invoking that same analysis here, see Pet. App. 7a, the lower court necessarily disposed of petitioner's *Charming Betsy* claim on grounds entirely independent of its Section 123/129 analysis.

Second, the decision below precludes reliance on the *Charming Betsy* canon to determine the legality of the Department's zeroing practice, whether or not the Section 123/129 process has run its course. To be sure, the court stated that it would not reverse the Department's zeroing practice "unless and until" the WTO's ruling is adopted pursuant to Section 129. Pet. App. 10a. But, as Corus explains next, it is clear that, under the decision below, even the adoption of a WTO ruling by the U.S. government will not permit courts to employ the *Charming Betsy* doctrine to invalidate the Department's interpretation.

As a practical matter, unless this Court grants the petition, even a successful challenge before the WTO to the very antidumping duty order at issue here will not result in recovery by Corus of the millions of dollars in duty deposits it has already paid under that order. Even if the European Commission succeeds in the WTO challenge it has brought against the same antidumping order that is the subject of Corus's appeal, and even if the U.S. government decides to implement a WTO finding in Corus's favor under Section 129, the United States will implement only by issuing a WTO-compliant determination in the particular proceeding (*i.e.*, it will not eliminate zeroing in other proceedings), and it will apply that determination on a prospective basis only (*i.e.*, it will not refund duties Corus has already paid under the antidumping order). See 19 U.S.C. § 3538(b)(2), (c)(1). Thus, in a judicial challenge to a Section 129 implementation decision, see *id.* § 1516a(a)(2)(B)(vii), Corus could not attack

the application of zeroing to imports that occurred prior to the date of implementation of a Section 129 decision.

Moreover, even if (unlike the situation here) a case were to arise in a procedural posture similar to the one before the Binational Panel—*i.e.*, where the WTO had issued an adverse report on zeroing and the Department had implemented that report before the conclusion of judicial proceedings challenging the underlying antidumping order—the Federal Circuit's logic would still bar use of the *Charming Betsy* doctrine to invalidate that order. The court reasoned that it was the "foreign policy implications of *a dumping determination*" that barred application of the *Charming Betsy* doctrine. Pet. App. 10a (emphasis added). Because Section 129 operates only prospectively, however, the government need not address the propriety of the antidumping order as applied to imports prior to the date of the Section 129 determination, and its decision to implement a WTO report prospectively will therefore shed no light on the foreign policy implications of continuing to apply a "zeroing-based" antidumping order to such imports. See *Binational Panel Final Determination* at 34-36, Pet. App. 110a-113a (Section 129 implementation decision does not reveal the views of the political branches concerning the propriety of underlying antidumping order). Under the Federal Circuit's reasoning, the foreign policy implications raised by such continued application will remain the exclusive concern of the political branches, and will continue to preclude use of the *Charming Betsy* canon to invalidate an antidumping order that the government has rescinded on a prospective-only basis.

Thus, the Federal Circuit necessarily did reach and resolve the *Charming Betsy* issue in a manner fundamentally at odds with the Binational Panel's resolution of this same issue. Indeed, it is equally clear that the two tribunals differed over the preclusive effect of Section 129. The Panel assumed without deciding that this provision precludes application of the *Charming Betsy* doctrine only while the implementation

process "run[s] its course," and expressly stated that the preclusive effect of this scheme "is not . . . without limits." *Binational Panel Final Determination* at 32, Pet. App. 109a. The Panel stated that the URAA, which added Sections 123 and 129, "does not render *Charming Betsy* unavailable as a rule of statutory construction." *Id.* at 42, Pet. App. 119a. Yet, as just explained, that is precisely the practical and legal effect of the Federal Circuit's ruling in the decision below.

Finally, the different outcomes in this case confirm the existence of a conflict. Unless the petition is granted, the decision of the WTO that the zeroing practice on which the antidumping order against Corus was based violated the AD Agreement and therefore (according to the Binational Panel) violated the Tariff Act itself, will not result in the recovery by Corus of the millions of dollars in duty deposits it has already paid in the proceedings conducted under that invalid order. Under the Binational Panel's less restrictive understanding of the Section 123/129 implementation processes, however, the Canadian lumber companies are entitled to a recalculation of their dumping margins without zeroing—precisely the relief that the Federal Circuit's decision denies to Corus.

The conflict between the decision below and that of the Binational Panel plainly warrants this Court's review. Under the review scheme Congress has created, these are the only two appellate bodies with authority to address definitively the propriety of the Department's zeroing practice. 19 U.S.C. § 1516a(a), (g). Yet the outcome of two antidumping cases that involved the same agency interpretation and that were both decided after the WTO Appellate Body deemed that interpretation violative of U.S. treaty obligations, turned entirely on the fortuity of forum. This is intolerable in an area such as international trade regulation, which affects commercial activity on a global basis and for which the consistent application of rules is of critical importance.

B. The Department's Interpretation Conflicts With The United States' Treaty Obligations.

The underlying issue of federal law is also an exceedingly important one.

The United States indisputably bound itself, by treaty, to make a "fair comparison . . . between the export price and the normal value" of imported goods when determining antidumping liabilities and duties and to give full consideration to all comparable export sales. AD Agreement, art. 2.4, 2.4.2, Pet. App. 150a-152a. The international body charged with interpreting the treaty has now conclusively ruled that the Department's practice of zeroing negative dumping margins in investigations violates these requirements. See *supra* at 10. The Federal Circuit was fully aware of this ruling, yet nevertheless upheld this practice as a reasonable interpretation of an ambiguous statute, despite the fact that the statute was designed "to bring U.S. law fully into compliance with U.S. obligations under those agreements." SAA at 669, Pet. App. 154a.

This treaty violation cannot be brushed aside on the ground that WTO rulings are "nonbinding." Pet. App. 9a. As the Binational Panel explained, it is the treaty itself, not the WTO's ruling, that imposes certain obligations on the United States when it determines dumping margins. *Binational Panel Final Determination* at 27, Pet. App. 104a. The WTO's *Softwood Lumber* ruling simply established "with considerable authority"—not by virtue of any binding effect—that zeroing conflicts with the treaty's requirements. *Id.*

This treaty violation warrants plenary review and reversal of the decision below. This Court has emphasized that, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as

to violate international agreements." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995); see also *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word"). By failing to exercise the requisite caution here, the lower court upheld an interpretation that not only undermines the Nation's "role as a trusted partner in multilateral endeavors," but also exposes it to international sanctions.

As the Binational Panel recognized, the *Charming Betsy* doctrine is designed to avoid precisely these international legal violations and untoward results. By requiring that statutes be construed, where possible, to avoid violations of "the law of nations" (*i.e.*, U.S. international obligations), the *Charming Betsy* rule necessarily excludes from the range of otherwise reasonable interpretations those that violate an international obligation of the United States. This principle should have applied with particular force in this case, where the Department was implementing an ambiguous statute expressly intended to ensure compliance with that treaty.

This Court should not allow the lower court's affirmation of this misguided interpretation of the Tariff Act to stand. The only other appellate body with authority to review that interpretation has exposed the obvious flaws in the Federal Circuit's reasoning and conclusion. Because no other courts can weigh in on the issue, and because of its obvious importance to the Nation's role "as a trusted partner in multilateral endeavors," this Court should grant the petition and reverse the decision below.

II. THE DECISION BELOW CREATES A BROADER DOCTRINAL SPLIT OVER THE ROLE OF THE *CHARMING BETSY* CANON IN CASES INVOLVING *CHEVRON* DEFERENCE.

In addition to creating conflicts with a Binational Panel decision and U.S. treaty obligations, the decision below also

creates a broader doctrinal conflict over the proper role of the *Charming Betsy* doctrine in cases involving agency interpretations of ambiguous statutes. In contrast to the court below, the D.C. Circuit has applied the *Charming Betsy* canon to ensure that agency interpretations do not conflict with the Nation's international legal obligations. Because it can ultimately affect the United States' compliance with a variety of international legal duties, this doctrinal conflict is an important one warranting this Court's review.

Unlike the Federal Circuit, the D.C. Circuit has recognized that the *Charming Betsy* rule makes it reasonable, under *Chevron*, for an agency to consider U.S. compliance with international legal obligations when interpreting a statute even if the statute itself does not list such compliance as a factor the agency should consider. In *George E. Warren Corp.* v. *U.S. EPA*, 159 F.3d 616, 623-24 (D.C. Cir. 1998), *amended on other grounds by* 164 F.3d 676 (D.C. Cir. 1999), the petitioners argued that a statute's specification of factors the EPA was to consider in promulgating an air quality rule barred the EPA from considering any other factors, including a decision of the WTO Appellate Body that had concluded that EPA's prior air quality rule violated the GATT. The D.C. Circuit disagreed, holding that, under the second prong of *Chevron*, the agency's conclusion that the statute permitted such consideration was permissible. *Id.* at 624. The Court found that the EPA's consideration of factors not enumerated in the statute, including the WTO Appellate Body decision, was "congruent with . . . the Supreme Court's instruction to avoid an interpretation that would put a law of the United States into conflict with a treaty obligation of the United States." *Id.* (citing *Charming Betsy*). The D.C. Circuit thus recognized that, where Congress has not unambiguously spoken to the precise issue, the *Charming Betsy* rule affords agencies discretion to adopt an interpretation of a statute that ensures that the United States does not violate its obligations under international law.

In the decision below, however, the Federal Circuit adopted a directly contrary approach. It concluded that the statute's "exhaustive" specification of factors the Department should consider when calculating "normal value" deprived the Department of discretion to interpret the statute in a manner that does not violate U.S. treaty obligations. Pet. App. 7a-8a. The Federal Circuit failed to recognize, as the D.C. Circuit has, that a statutory specification of factors an agency must consider cannot, without more, be understood to prevent an agency from ensuring that implementation of that law does not place the United States in violation of its treaty obligations. Indeed, the Federal Circuit's approach inescapably *increases* the likelihood of such violations—both by deferring to interpretations that create such violations and by denying agencies discretion to avoid them.[12]

This broader conflict among the circuits on an important doctrinal issue that affects the United States' compliance with its international legal obligations simply underscores the need for review of the decision below.

III. THE PROPER ROLE OF THE *CHARMING BETSY* CANON IN CASES INVOLVING *CHEVRON* REVIEW OF AGENCY INTERPRETATIONS IS A RECURRING ISSUE.

The conflict over the proper application of the *Charming Betsy* canon in cases involving *Chevron* review of agency

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[12] In fact, the decision below is not an isolated aberration in Federal Circuit case law. In *Suramerica de Aleaciones Laminadas C.A.* v. *United States*, 966 F.2d 660 (Fed. Cir. 1992), the court held that, even though an agency was implementing an ambiguous statute, it lacked discretion to adopt an interpretation that avoided a treaty violation: "if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy." *Id.* at 667-68. This argument, however, misses the point. Where, as in *Suramerica* and in this case, the statutory provisions at issue are unclear, there is no basis for concluding that they *require* action inconsistent with the U.S. treaty obligations.

interpretations of ambiguous statutes is a recurring and indisputably important one.

The economic significance of the treaty violation that the Federal Circuit has sanctioned in this case is itself enormous. Corus estimates that, in 2004 alone, the Department used its treaty-violating zeroing practice in 92 antidumping investigations and reviews involving approximately 600 companies from numerous countries around the world. The Congressional Budget Office estimates that, in the years 2005-2009, the United States will collect $3.5 billion in dumping and countervailing duties, and $5.3 billion for the period 2005-2015. Cong. Budget Office, *CBO's Estimate of Spending Under the CDSOA* 1 (Mar. 15, 2005).

Imposition of these duties does not merely harm foreign exporters to the United States and U.S. importing industries. These duties will be imposed on a broad range of goods used in a variety of downstream products. As a result, these billions of dollars in duties will eventually be "paid by virtually every U.S. business and consumer." G. Husisian, *When A New Sheriff Comes To Town: The Impending Showdown Between The U.S. Trade Courts And The World Trade Organization*, 17 St. John's J. Legal Comment. 457, 458 (2003). Indeed,

> [t]he main economic losers [of U.S. antidumping laws and policies] are the owners of and workers in U.S. businesses that use imported goods, as well as U.S. consumers who pay higher prices for their goods and services. In addition, antidumping policy harms U.S. exporters as a whole because it leads to an adjustment in foreign exchange rates and a decline in the competitiveness of U.S. exports in world markets. Moreover, foreign countries are following the U.S. lead by imposing antidumping duties on U.S. exports.

Proposed Antidumping Regulations and Other Antidumping Issues before the Subcomm. on Trade of the H. Comm. on

Ways & Means, 104th Cong. (Apr. 23, 1996) (Statement of Jan Paul Acton, Assistant Director, Natural Resources and Commerce Division, Congressional Budget Office 2-3, *available at* http://www.cbo.gov/ftpdocs/47xx/doc4746/1996Doc09.pdf.)

In addition, the domestic countervailing duty law is also governed by a WTO agreement.[13] Administrative implementation of that law will inevitably implicate the United States' compliance with the WTO agreement. See Husisian, *supra*, at 470 (noting that "it is inevitable that the role that the WTO plays in the resolution of trade disputes and in the disposition of appeals in trade courts will only grow"). The federal courts will inevitably be called upon to evaluate the propriety, under *Chevron*, of these implementation decisions.

Nor is international trade the only area in which courts must address this issue. The interplay of the *Charming Betsy* rule and *Chevron* analysis has already arisen in connection with statutes governing the removal of aliens from the United States, *Ali* v. *Ashcroft*, 346 F.3d 873, 885 (9th Cir. 2003), *opinion withdrawn on other grounds for remand on denial of reh'g by* __ F.3d __, 2005 WL 2045645 (9th Cir. 2005) (citing *Jama* v. *INS*, 125 S. Ct. 694 (2005)), the importation of poultry, *Mississippi Poultry Ass'n* v. *Madigan*, 992 F.2d 1359, 1366 (5th Cir.), *amended on other grounds by* 9 F.3d 1113 (5th Cir. 1993), and the promulgation of regulations governing the air quality in the United States, *George E. Warren Corp.*, 159 F.3d at 624. This list, moreover, is by no means exhaustive. As Justice Breyer recently noted,

> we face an increasing number of domestic legal questions that directly implicate foreign or international law . . . . The growing number of such statutes [*i.e.*, for which reference to foreign legal sources is an appropriate source of interpretive guidance] reflects the

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[13] *Agreement on Subsidies and Countervailing Measures*, *reprinted in* H.R. Doc. 103-316, vol. I, at 1533-76 (1994).

> commercial, technological, and political changes that we often use the cliché "globalization" to describe.[14]

Indeed, the increasing recognition that many complex problems require transnational regulatory solutions has led the United States in recent years to accede to a number of international agreements, and to enact implementing legislation implemented by administrative agencies. Given the burgeoning number of such laws and the importance of ensuring that the United States is able to "gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors," *Vimar*, 515 U.S. at 539, this Court should grant the petition and provide the lower courts with the guidance they need to address this recurring and fundamental issue of administrative law.

IV. THE LOWER COURT'S MISTAKEN VIEW THAT IT LACKED AUTHORITY TO REVIEW A DISCRETIONARY INTERPRETATION OF THE TRADE LAWS WARRANTS REVIEW.

In the decision below, the Federal Circuit did not merely defer to the Department's erroneous interpretation of an ambiguous statute. It concluded that Sections 123 and 129 of the Tariff Act stripped it of authority to review a discretionary agency interpretation alleged to violate U.S. treaty obligations. This remarkable and erroneous conclusion—which effectively dilutes Congress's authority as the primary voice of the United States on matters of foreign commerce—provides yet another reason for granting the petition.

This Court requires "clear and convincing evidence" to overcome the "strong presumption [of] judicial review of administrative action." *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988) (internal quotation marks omitted). This require-

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[14] Justice Stephen Breyer, The Supreme Court and the New International Law, Address at the The American Society of International Law, 97th Annual Meeting (Apr. 4, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

ment ensures the supremacy not of the courts, but of Congress. See S. Breyer et al., *Administrative Law and Regulatory Policy* 832 (4th ed. 1999); see also *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (quoting the legislative history of the Administrative Procedure Act for the proposition that Congress intends statutes to be " 'judicially confined to the scope of authority granted or to the objectives specified,'" for otherwise "'statutes would in effect be blank checks drawn to the credit of some administrative officer'"). By deeming the foreign policy implications of antidumping orders to fall within the exclusive province of the political branches, however, the Federal Circuit improperly conferred unfettered discretion on the Department to implement an ambiguous provision of the Tariff Act in whatever manner the agency sees fit.

Nothing in Sections 123 and 129 provides the clear and convincing evidence necessary to foreclose judicial review of a claim that the Department has improperly interpreted an ambiguous provision of the Tariff Act. Section 123 provides for the amendment of agency regulations or practices found by the WTO to violate the Uruguay Round Agreements. It permits a treaty-conforming amendment following a period of notice and public comment, and the expiration of a 60-day waiting period after consultations with certain congressional committees. 19 U.S.C. § 3533(g)(1) & (2). Section 129 similarly authorizes the Trade Representative to order the implementation, in whole or in part, of a determination that would render an action by the Department "not inconsistent with the findings of the [WTO] panel or the Appellate Body," again after a period of consultation with congressional committees and public comment. *Id.* § 3538(b).

Neither of these provisions even refers to judicial proceedings, let alone expressly forecloses review of claims in such proceedings when an adverse WTO decision is rendered. Cf. *Traynor*, 485 U.S. at 543-45 (statute barring review of decisions "on any question of law or fact under"

veterans benefit laws, 38 U.S.C. § 211(a) (1988), did not bar claim that agency regulations violated Rehabilitation Act). Instead, consistent with the general intent underlying the URAA, both are structured to ensure that agency regulations and practices, and the Department's actions, conform to the treaty in the future, subject to consultation and waiting periods that enable Congress to override such changes if it so chooses.[15]

Indeed, the SAA reflects Congress's understanding that courts *would* review Department orders notwithstanding the Section 129 implementation process. It notes that in some cases a Section 129 determination will render moot some or all issues in pending litigation (such as where the litigation involves only a challenge to the cash deposit rate). SAA at 1027, Pet. App. 156a. But, where "litigation also involve[s] the validity of the original determination, the court . . . *would still have to render an opinion on that subject*." *Id.* (emphasis added). In fact, the SAA notes that a change necessary to bring the United States into compliance with an adverse WTO report can sometimes be brought about through "judicial action." *Id.* at 1033, Pet. App. 157a. As this very case illustrates, however, under the decision below a court cannot "render an opinion on th[e] subject" of the validity of an initial antidumping order, and cannot ensure that the United States brings itself into compliance with an adverse WTO report, because the existence of Section 129 and the foreign policy implications of antidumping orders preclude judicial review. See *supra* at 19.

The Federal Circuit's refusal to conduct judicial review thus has frustrated Congress's intent to ensure the "implementation of federal statutes consistently with the Uruguay Round

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[15] Section 123's 60-day waiting period before proposed changes to regulations and practices take effect parallels the waiting period of the Congressional Review Act, which simply assures that Congress has a chance to bar implementation of regulations. *See* 5 U.S.C. § 801(a)(3)(A).

agreements, where," as here, that is "permissible under the terms of [the] statute[]." SAA at 670, Pet. App. 155a. In doing so, moreover, the Federal Circuit improperly elevated the role of the Executive Branch in the area of foreign commerce. In this area, Congress, not the Executive, is "the preeminent speaker." *Barclay's Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 329 (1994).

In short, the lower court's conclusion that it lacked authority to determine whether the Department's interpretation violated U.S. treaty obligations ignored the strong presumption of judicial review of administrative action, frustrated congressional intent, and gave undue discretion to the Executive in an area where Congress's voice "is the Nation's." *Id.* at 331. This extraordinary and misguided ruling further underscores the need for plenary review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 15, 2005

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 04-1107

CORUS STAAL BV and CORUS STEEL USA INC.,
Plaintiffs-Appellants,

v.

DEPARTMENT OF COMMERCE,
Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,
Defendant-Appellee,

and

NATIONAL STEEL CORPORATION, BETHLEHEM STEEL CORPORATION, STEEL DYNAMICS, INC., IPSCO STEEL INC., GALLATIN STEEL COMPANY, and NUCOR CORPORATION,
Defendants.

Jan. 21, 2005

Rehearing and Rehearing En Banc Denied May 18, 2005.

Before MAYER, Circuit Judge*, PLAGER, Senior Circuit Judge, and PROST, Circuit Judge.

MAYER, Circuit Judge.

Corus Staal BV and Corus Steel USA Inc. (collectively "Corus") appeal the judgment of the Court of International

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* Haldane Robert Mayer vacated the position of Chief Judge on December 24, 2004.

Trade, *Corus Staal BV v. Dep't of Commerce*, 283 F.Supp.2d 1357 (Ct. Int'l Trade 2003), affirming the Department of Commerce's ("Commerce's") zeroing methodology to calculate the weighted-average dumping margin for imports of Corus' hot-rolled carbon steel flat products ("hot-rolled steel") from the Netherlands. We affirm.

Background

On December 4, 2000, Commerce initiated an antidumping duty investigation of alleged less-than-fair-value sales of hot-rolled steel from the Netherlands and several other foreign producers during the period of October 1, 1999, through September 30, 2000. Notice of Initiation of Antidumping Duty Investigations: Certain Hot-Rolled Carbon Steel Flat Products From Argentina, India, Indonesia, Kazakhstan, the Netherlands, The People's Republic of China, Romania, South Africa, Taiwan, Thailand, and Ukraine, 65 Fed.Reg. 77,568 (Dec. 12, 2000). Based on its review, Commerce calculated a preliminary weighted-average dumping margin for Corus of 2.44 percent. Notice of Preliminary Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands, 66 Fed.Reg. 22,146 (May 3, 2001) ("Preliminary Notice"). Commerce issued a final determination of less-than-fair-value sales in Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands, 66 Fed.Reg. 50,408 (Oct. 3, 2001), *as amended by* 66 Fed.Reg. 55,637 (Nov. 2, 2001) ("Final Determination"), in which it revised the weighted-average dumping margin to 2.59.

Commerce's methodology for calculating the weighted-average dumping margin was controlled by 19 U.S.C. § 1677(35). First, it calculated the "dumping margin" for individual U.S. transactions, which is "the amount by which

the normal value exceeds the . . . constructed export price[1] of the subject merchandise." *Id.* § 1677(35)(A). Next, Commerce calculated the weighted-average dumping margin "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate . . . constructed export prices of such exporter or producer." *Id.* § 1677(35)(B). Commerce used a methodology called "zeroing" in this second step whereby only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) were aggregated, and negative margins (i.e., margins for sales of merchandise sold at nondumped prices) were given a value of zero.

Corus appealed the final determination to the Court of International Trade challenging, *inter alia*, Commerce's zeroing methodology. It argued that the use of zeroing is an unreasonable interpretation of the statute, resulting in a fundamentally unfair comparison that ignores certain transactions (i.e., nondumped sales), and a distorted final margin. The court affirmed Commerce's methodology under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), concluding that: (1) sections 1677(35)(A) & (B) neither require nor prohibit Commerce from considering nondumped sales; and (2) zeroing was a reasonable interpretation of the statute. *Corus Staal BV v. Dep't of Commerce*, 259 F.Supp.2d 1253, 1261-63 (Ct. Int'l Trade 2003). The case was remanded for reasons not pertinent to this appeal, and final judgment was

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[1] Normal value ("NV") is the price Corus charged for hot-rolled steel in the Dutch home market. Constructed export price ("CEP") is the price Corus charged for hot-rolled steel in the United States. *See Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342 (Fed.Cir.2001). Commerce viewed all Corus transactions as CEP. Preliminary Notice, 66 Fed.Reg. at 22,148. Commerce uses CEP if, before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter. 19 U.S.C. § 1677a(b) (2000).

entered in *Corus Staal BV v. Department of Commerce*, 283 F.Supp.2d 1357 (Ct. Int'l Trade 2003). Corus appeals and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

Discussion

We review the grant of judgment on the agency record by the Court of International Trade without deference. *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed.Cir.1992). We apply anew the same standard used by the trial court, *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1307-08 (Fed.Cir.2001), and will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law," 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). We apply a two-part inquiry to determine whether to sustain Commerce's interpretation of 19 U.S.C. § 1677(35)(A)-(B). *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. First, we determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* "[I]f the statute is silent or ambiguous with respect to the specific issue," however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. In recognition of Commerce's expertise in the field of anti-dumping investigations, we accord deference to its statutory interpretation in the presence of ambiguity. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed.Cir.2001).

Corus challenges the court's finding that Commerce's interpretation of section 1677(35) is reasonable, arguing that: (1) zeroing is inconsistent with the unambiguous statutory scheme for administrative investigations, making that practice both unlawful and unreasonable; and (2) Commerce's zeroing methodology violates the United States' obligation to inter-

pret section 1677(35) to conform to World Trade Organization ("WTO") decisions prohibiting zeroing. Because zeroing is in fact permissible in administrative investigations and because Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law, Corus' arguments fail.

I.

Corus primarily argues that section 1677(35) requires Commerce to base its final determination on weighted-average dumping margins that include all prices for all of the merchandise under investigation, not merely the prices of transactions that yield positive dumping margins. They allege that, had zeroing not been used, its weighted-average dumping margin would have been -4.7 percent, thereby avoiding the antidumping duty.

In essence, Corus urges us to draw a distinction in the application of section 1677(35) as between administrative investigations and administrative reviews. Such a distinction is necessary in order for Corus to avoid *Timken Co. v. United States*, 354 F.3d 1334 (Fed.Cir.2004), where we upheld Commerce's section 1677(35) zeroing methodology in administrative reviews under *Chevron's* second prong. The distinction Corus alleges cannot be found on the face of section 1677(35) itself, but in the underlying statutes defining investigations[2] and reviews.[3] Specifically, Corus argues that

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[2] 19 U.S.C. § 1677f-1(d)(1)(A)-(d)(1)(A)(i) (2000). In relevant part, the statute states:

> In an investigation . . . the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value . . . by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise . . . .

[3] 19 U.S.C. § 1675(a)(2)(A) (2000). In relevant part, the statute states:

> For the purpose of [administrative review of any antidumping duty], the administering authority shall determine . . . the normal value and

the reference in section 1677f-1(d)(1)(A)(i) to "weighted average" unambiguously contemplates the use of *all* subject merchandise in administrative investigations to calculate the weighted average, as opposed to section 1675(a)(2)(A)'s calculation of individual dumping margins for each export transaction in administrative reviews. As such, their argument continues, *Chevron* is inapplicable and Commerce's practice should not stand.

We agree that a distinction exists between administrative investigations and reviews. The true distinction, however, is not as alleged by Corus, and does not have the effect of making *Timken* inapposite. It is true that the comparisons between U.S. price (here, CEP) and NV differ between investigations and reviews, but they differ because investigations compare average U.S. price to average NV, while reviews compare U.S. price to monthly average NV on an entry-by-entry basis. Further, this distinction is subsumed under Commerce's methodology: the result of the comparison of NV and CEP, whether in the context of investigations or reviews, falls under section 1677(35)(A) (the first step of the methodology) and is then aggregated under section 1677(35)(B) (the second step). Our decision in *Timken* addressed Commerce's interpretation of section 1677(35); it is of no consequence that it was decided in the context of a review. Therefore, *Timken* governs, and the Court of International Trade was correct to find Commerce's zeroing methodology permissible in the context of administrative investigations.

II.

Corus alternatively argues that Commerce unreasonably refused to interpret the statute in a manner consistent with

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export price (or constructed export price) of each entry of the subject merchandise, and . . . the dumping margin for each such entry.

U.S. international obligations under the *Charming Betsy* doctrine of claim construction, which states that courts should interpret U.S. law, whenever possible, in a manner consistent with international obligations. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 2 L.Ed. 208 (1804). Corus asserts that, by disregarding the prices of certain U.S. transactions that are made at nondumped prices, Commerce violated its obligation under Article 2.4.2 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade ("Antidumping Agreement" or "ADA")[4] to fairly consider all comparable export transactions. This "fair comparison" argument is the same argument offered by the appellant in *Timken*. In that case, we held that the appellant's invocation of the ADA's "fair comparison" language was misplaced because section 1677b(a)'s[5] fair comparison language and explicit scheme for calculating NV governed. 354 F.3d at 1344. Because "[section] 1677b(a) does not impose any requirements for calculating normal value beyond those explicitly established in the statute and does not carry over to create additional limitations on the

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[4] Agreement on Implementation of Article VI of GATT art. 2.4.2 (Apr. 15, 1994), *reprinted in* H.R. Doc. No. 103-316, vol. 1, at 1455 (1994). Article 2.4.2 states in pertinent part:

> Subject to the provisions governing *fair comparison* . . . the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all* comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.

(Emphases added.)

[5] In relevant part, the statute states:

> In determining . . . whether subject merchandise is being, or is likely to be, sold at less than fair value, a *fair comparison* shall be made between the export price or constructed export price and normal value.

(Emphasis added.)

calculation of dumping margins," *id.*, we likewise dismiss Corus' invocation of the "fair comparison" language.

Corus further claims that Commerce violated the ADA by failing to discontinue its zeroing methodology in light of WTO Appellate Body interpretations in *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("*EC-Bed Linen*"), *United States—Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Dec. 15, 2003) ("*Corrosion-Resistant Steel*"), and *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) ("*Softwood Lumber*"). In *EC-Bed Linen*, a case in which the United States was not a party, the Appellate Body determined that the EC practice of zeroing during an antidumping investigation was inconsistent with Article 2.4.2 of the ADA. WT/DS141/AB/R ¶ 66. In *Corrosion-Resistant Steel*, the Appellate Body hypothesized (without finding) that Commerce had used zeroed margins from administrative reviews in its sunset review of antidumping orders on Japanese steel products, and suggested that any such use would violate the ADA. WT/DS244/AB/R ¶ 135. In *Softwood Lumber*, the Appellate Body found that Commerce violated Article 2.4.2 when it used zeroing to calculate the weighted-average dumping margin in its investigation of imports of Canadian softwood lumber. WT/DS264/AB/R ¶ 7.224.

WTO decisions are "not binding on the United States, much less this court." *Timken*, 354 F.3d at 1344. Further, "[n]o provision of any of the Uruguay Round Agreements [e.g., the ADA], nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512(a) (2000). Neither the GATT nor any enabling international agreement outlining compliance therewith (e.g., the ADA)

trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress. *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir.1992); *see also* 19 U.S.C. § 2504(a) (2000) ("No provision of any trade agreement . . . nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States."). Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation. *See* 19 U.S.C. §§ 3533(f), 3538 (2000); *see also* 19 U.S.C. § 3533(g) (2000) (defining a statutory scheme that Commerce must observe in order to change its policy to conform to a WTO ruling).

We therefore accord no deference to the cited WTO cases. *EC-Bed Linen* is no more persuasive here than it was for the appellant in *Timken*, and we now reject it for the same reasons cited in that case. *See Timken*, 354 F.3d at 1344. *Corrosion-Resistant Steel* is nonbinding because the Appellate Body did not make a finding regarding Commerce's zeroing methodology. WT/DS244/AB/R ¶ 138. Finally, we reject *Softwood Lumber* as nonbinding because the finding therein was not adopted as per Congress's statutory scheme.

"[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government . . . ." *United States v. Pink*, 315 U.S. 203, 222-23, 62 S.Ct. 552, 86 L.Ed. 796 (1942). In this case, section 1677(35) presented Commerce with a choice as to how it calculates weighted-average dumping margins. We give Commerce substantial deference in its administration of the

statute because of the foreign policy implications of a dumping determination. *See Fed.-Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed.Cir.1995). We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.

Conclusion

Accordingly, the judgment of the Court of International Trade is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

SLIP OP. 03-127
No. 02-00003

CORUS STAAL BV, and CORUS STEEL USA INC.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE,
Defendants,

and

NATIONAL STEEL CORP., BETHLEHEM STEEL CORP., and
UNITED STATES STEEL CORP.,
Defendant-Intervenors.

Sept. 29, 2003

JUDGMENT

RESTANI, Judge.

This case having come before the court for decision on the Remand Determination, consistent with Slip Op. 03-101, entered on August 12, 2003,

IT IS HEREBY ORDERED that the Remand Determination is sustained, as amended on September 2, 2003.

APPENDIX C

UNITED STATES COURT OF
INTERNATIONAL TRADE

Slip Op. 03-25
No. 02-00003

CORUS STAAL BV, and CORUS STEEL USA INC.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE,
Defendants,

and

NATIONAL STEEL CORP., BETHLEHEM STEEL CORP., and
UNITED STATES STEEL CORP.,
Defendant-Intervenors.

March 7, 2003

OPINION

RESTANI, Judge.

This consolidated matter is before the court on cross-motions for judgment on the agency record, pursuant to USCIT Rule 56.2. Corus Staal BV and Corus Steel USA Inc. (collectively "Corus") and Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation (collectively the "petitioners") separately challenge certain aspects of the final determination of the United States Department of Commerce ("Commerce") in *Certain Hot-Rolled Steel Flat Products from the Netherlands*, 66 Fed.Reg. 50,408 (Dep't Commerce Oct. 3, 2001), *as amended* by 66 Fed Reg. 55,637 (Dep't Commerce Nov. 2, 2001) ("*Final*

Determination"). In their motion, the petitioners challenge Commerce's decision to reclassify certain Corus sales as export price. In its motion, Corus argues that (1) Commerce's "zeroing" methodology is contrary to law; (2) Commerce erred in determining that Laura Metaal BV was affiliated with Corus; (3) Commerce improperly considered certain non-prime sales; (4) Commerce erred in denying Corus a level of trade adjustment for certain affiliated sales; and (5) Commerce failed to properly instructed the United States Customs Service ("Customs") to cease collection of provision measures after six months.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction over this antidumping duty proceeding pursuant to 28 U.S.C. § 1581(c) (2000). The court will uphold Commerce's determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

FACTUAL & PROCEDURAL BACKGROUND

On December 4, 2000, Commerce initiated antidumping investigations to determine whether imports of hot-rolled carbon steel flat products from various countries, including the Netherlands, were being sold in the United States at less-than-fair-value ("LTFV"). *See Notice of Initiation of Antidumping Duty Investigations: Certain Hot-Rolled Carbon Steel Flat Products From Argentina, India, Indonesia, Kazakhstan, the Netherlands, the People's Republic of China, Romania, South Africa, Taiwan, and Ukraine*, 65 Fed.Reg. 77,568 (Dep't of Commerce Dec. 12, 2000). Corus Staal BV ("CSBV") manufactures subject hot-rolled steel in the Netherlands and was identified as the only producer of hot-rolled steel from the Netherlands. *Id.* at 77,573. Corus Steel USA Inc. ("CSUSA") is affiliated with CSBV and, among

other things, imports the subject merchandise. Both were respondents in the underlying investigation.

On May 3, 2001, Commerce published an affirmative preliminary determination of sales at less than fair vaule ("LTFV") with respect to hot-rolled steel from the Netherlands. *Notice of Preliminary Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed.Reg. 22,146 (Dep't of Commerce May 3, 2001) ("Preliminary Determination"). The Preliminary Determination ordered the suspension of liquidation of all entries of hot-rolled steel from the Netherlands and calculated a weighted-average dumping margin for Corus. *Id.* at 22,151.

On May 22, 2001, Corus requested a postponement of the final determination pursuant to 19 C.F.R. § 351.210(b)(2)(ii), as permitted by 19 U.S.C. § 1673d(a)(2),[1] including an extension of the provisional measures from a four month period to not more than six months. *See* Corus' May 22, 2001 Letter to Commerce. On June 4, 2001, Commerce granted the request and postponed the final determination until no later than September 15, 2001, and the suspension of liquidation until October 30, 2001. *See Postponement of Final Determination for Antidumping Duty Investigation: Certain Hot-Rolled Carbon Steel Flat Products From the*

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[1] Section 1673d(a)(2) provides, in relevant part, that:

> The administering authority may postpone making the final determination under paragraph (1) until not later than the 135th day after the date on which it published notice of its preliminary determination under section 1673b(b) of this title if a request in writing for such a postponement is made by—
>
> (A) exporters who account for a significant proportion of exports of the merchandise which is the subject of the investigation, in a proceeding in which the preliminary determination by the administering authority under section 1673b(b) of this title was affirmative[.]

Netherlands, 66 Fed.Reg. 32,600 (Dep't of Commerce June 15, 2001).

Due to the events of September 11, Commerce issued its affirmative final determination on September 21, 2001, finding that hot-rolled steel from the Netherlands was being sold, or likely being sold, in the United States at LTFV. *Final Determination*, 66 Fed.Reg. at 50,408 (Dep't Commerce Sept. 21, 2001), *amended* 66 Fed.Reg. at 55,637 (November 2, 2001) (revising the weighted average dumping margin for Corus). In the amended *Final Determination*, Commerce directed Customs to continue suspending liquidation of subject imports "until further notice." *Id.* at 55,639.[2] Commerce published its final antidumping order on November 29, 2001. *Antidumping Duty Order: Certain Hot-rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed.Reg. 59,965 (Dep't Commerce Nov. 29, 2001). Corus and the petitioners separately appealed the *Final Determination*.[3] On June 20, 2002, the court consolidated petitioners' appeal (No. 02-00028) with Corus' appeal (No. 02-00003). These motions followed.

DISCUSSION

I. The Petitioners' Motion

As an initial matter, Commerce and the petitioners are in agreement that a remand is necessary to address the United States price treatment of tolled sales (sales to another party for further processing). Corus opposes the remand. In *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed.

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[2] On November 15, 2001, the United States International Trade Commission published an affirmative injury determination. *See Hot-Rolled Carbon Steel Flat Products From China, India, Indonesia, Kazakhstan, The Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 66 Fed.Reg. 57,482 (Int'l Trade Comm'n Nov. 15, 2001).

[3] Corus initiated its appeal on December 28, 2001 and the petitioners initiated theirs on December 31, 2001.

Cir.2001), the court addressed the issue of voluntary remand which is requested by the governmente [sic] when the original determination denying a favorable adjustment to a respondent was not required by statute. The court noted that if "bad faith" is not at issue, remand is appropriate to consider a different statutory interpretation. *See id.* at 1028-29. Whether or not new adjustments favorable to the petitioners occupy the same position as those affecting a respondent, remand must be on account of appropriate reasons.[4]

The court notes that the Federal Circuit did not discuss the line of cases indicating that mere policy changes should not be allowed to alter final agency determinations. *See, e.g., American Trucking Ass'n v. Frisco Transportation Co.*, 358 U.S. 133, 79 S.Ct. 170, 3 L.Ed.2d 172 (1958) (finding that the Interstate Commerce Commission cannot, without specific statutory authority, reconsider license and certificate decisions because of policy changes); *Upjohn Co. v. Pennsylvania Railroad Co.*, 381 F.2d 4, 5 (6th Cir.1967) (finding that granting a voluntary remand request based merely upon a change in policy "would result in chaos and uncertainty of action for those who must rely on its findings."); *Chapman v. El Paso Natural Gas Co.*, 204 F.2d 46, 53-54 (D.C.Cir.1953) ("[A] decision may not be repudiated for the sole purpose of applying some quirk or change in administrative policy."). In any case, concerns for finality do exist and the agency must

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[4] Domestic parties do not have duties imposed on their goods. Thus, there is no clear analogy here to the benefit recipients in *Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (remand to consider new statutory interpretation favorable to social security beneficiary), cited in *SKF USA, Inc. v. United States*. Furthermore, experience has shown that the agency can be put in the unfortunate position of being requested by powerful domestic interests and Congress persons to alter positions to favor the domestic party. The agency should be protected from such post-determination maneuvering as much as is possible, in order to avoid charges of bad faith decision-making and needless litigation.

state its reasons for requesting remand. Further, if only to guard against the "bad faith" requests of concern to the court in SKF, the court must be apprised of the reason for the remand request, whether it be on account of error or merely a change in policy. Commerce's brief does not provide any reason, policy or otherwise, for requesting a remand, although the domestic party makes clear that it believes error occurred. Commerce merely requests remand so that it can "reconsider its decision." This is insufficient to support a voluntary remand.

Commerce's failure, however, does not foreclose completely the petitioners' appeal. The petitioners may demonstrate error. The sole issue raised by the petitioners is whether Commerce properly classified Corus' tolled sales as export price ("EP") transactions in the *Final Detemination*.[5] Some of Corus' U.S. sales involved tolling operations performed in the United States. The petitioners argue that these sales were actually made in the United States by CSUSA, (CSBV's affiliated importer) and, therefore, should have been classified as constructed export price ("CEP") transactions.[6] The petitioners' challenge stems from a reversal by Commerce on this issue in the course of its investigation.

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[5] Under the statute, "export price" is defined as "the price at which subject merchandise is first sold (or agreed to be sold) before the date of importation *by the producer or exporter* of the subject merchandise *outside of the United States* to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States. . . ." 19 U.S.C. § 1677a(a) (emphasis added).

[6] Constructed export price is defined as "the price at which the subject merchandise is first sold (or agreed to be sold) *in the United States* before or after the date of importation by . . . the producer or exporter of such merchandise *or by a seller affiliated with the producer or exporter*, to a purchaser not affiliated with the producer or exporter." 19 U.S.C. § 1677a(b) (emphasis added).

In the *Preliminary Determination*, Commerce classified all of Corus' U.S. sales, including tolled sales, as CEP transactions, finding that sales were made in the United States. *Preliminary Determination*, 66 Fed.Reg. at 22,148. Although Corus did not further challenge this finding, Commerce later reclassified tolled U.S. sales as export price ("EP") transactions following verification. *See Final Determination*, 66 Fed.Reg. at 55,637-39. "Concerning the tolled merchandise, we verified that the sales in question were between Corus Staal and the U.S. Customer. The record does not show that Corus USA was involved in these transactions." *Issues and Decision Memorandum* at 15-16, Comment 10.

In *AK Steel Corp. v. United States*, 226 F.3d 1361 (Fed.Cir.2000), the court held that, in determining whether sales are EP or CEP transactions, the relevant inquiry is whether the merchandise was sold in the United States. *Id.* at 1371. In *AK Steel*, the court found that, under the antidumping statute, merchandise is "sold" when there is "both a transfer of ownership and consideration" and that the "seller" is the "party who transfers property in the contract of sale." *See id.*, 226 F.3d at 1371.

In conducting verification, Commerce reviewed one detailed sales trace of a tolled U.S. sale. *See* Home Market Verification of the Corus Group's Questionnaire Response in the Antidumping Investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, Exhibit 14 ("Sales Verification Report"). In this transaction, the merchandise was shipped from CSBV to an unaffiliated toller in the United States who further processed the material as specified by an unaffiliated U.S. customer. *See* Sales Verification Report at 7. Corus maintains that the terms of this sale were agreed upon prior to the shipment of the merchandise. In other words, Corus argues that the sale was made by the producer "outside of the United States." There is evidentiary support for this conclusion. CSBV made the requisite shipping

arrangements. *See* Sales Verification Exhibit 14 at C5013-C5014. CSBV incurred the cost of the additional processing. *See* Sales Verification Exhibit 16. Title transferred directly from CSBV to the U.S. Customer. *See* Corus' March 16, 2001 Supplemental Section A Response at A-11 ("Supp. Section A Response"). Unlike *AK Steel,* this case did not involve what are commonly referred to as "back-to-back" sales in which the producer sells the merchandise to its U.S. affiliate, who in turn, sells the merchandise to the unaffiliated U.S. customer. Back-to-back sales are necessarily CEP sales. The direct nature of this transaction supports the conclusion that the parties agreed *in advance* that the subject merchandise would be further processed, at CSBV's expense, once it arrived in the United States. As such, Commerce could have reasonably concluded that there was a transfer of ownership in the Netherlands.

Corus admits that CSUSA accepted payment for CSBV in the verified transaction (Corus argues that this is the only such instance). The parties, however, do not dispute that CSUSA immediately transferred the full amount to CSBV. *See* Sales Verification Exhibit 14 at C5034. The petitioners argue that CSUSA's acceptance of payment is the equivalent of consideration, but petitioners have not established that CSUSA benefitted from the transaction in any meaningful way. Based upon this evidence, Commerce could have concluded that CSBV, not CSUSA, received consideration for the sale.

The petitioners argue that, because CSUSA participated in tolled transactions, the sales were necessarily made in the United States. Corus concedes that CSUSA was involved in various aspects of some tolled sales and reported this involvement to Commerce. *See, e.g.*, Corus' Section A Response at A-18 ("CSUSA performs administrative and some limited selling functions on behalf of [CSBV]."). That is presumably why Commerce initially concluded that these

tolled sales were "made in the United States by CSUSA on behalf of CSBV" in the *Preliminary Determination.*

As *AK Steel* made clear, the focus of the inquiry is on the location of the sale rather than role played by the affiliated importer. *See id.* at 1369-76 (determining that the traditional test used by Commerce, as articulated in *PQ Corp. v. United States*, 11 CIT 53, 62-65, 652 F.Supp. 724, 733-35 (CIT 1987), incorrectly focused on the role played by the affiliated importer). The petitioners acknowledge this but, nevertheless, exert substantial energy arguing that the role of CSUSA in these transactions is conclusive. For example, petitioners point out that, on occasion, CSUSA (1) sat in on sales negotiations; (2) acted as importer of record; (3) received payment (from at least one customer and immediately transferred the full amount to CSBV); (4) maintained contact with CSBV's U.S. customers; and (5) performed various other selling functions. *See* Corus' Supp. Section A. Response at A-11. The court agrees that there is evidence suggesting the CSUSA's role in the transaction was more substantial than Corus admits.

The petitioners argue that Commerce failed to consider this contrary evidence. When asked at oral argument whether Commerce considered CSUSA's role and found nothing in verification, the petitioners replied in the affirmative, stating that Commerce indicated that it found "nothing" in the record. That is not accurate. Commerce did not state that it found "nothing," but instead stated that, upon verification, it concluded that "[t]he record does not show that Corus USA was involved in these transactions." When viewed in the context of the preceding sentence—"we verified that the sales in question were between Corus Staal and the U.S. Customer" —it is clear that Commerce is explaining that, upon verification, it determined this transaction, the sales contract, was exclusively between CSBV and the customer. During verification, CSBV personnel testified that CSBV was the

sole entity with authority to negotiate the terms of sale. *See* Sales Verification Report at 3-4; *see also* Supp. Section A Response a A-11. As discussed, the nature of the transaction suggests that CSBV contracted directly with the U.S. customer for the sale of merchandise. Commerce's conclusion is supported by this evidence. It is up to Commerce, not the court, to weigh the impact of CSUSA's involvement against conflicting evidence that was properly submitted during verification.

Contrary to the petitioners' argument, Commerce may change its position even though Corus did not continue to argue that tolled sales should be considered EP sales after the *Preliminary Determination* concluded otherwise.[7] That Commerce reversed its position in the absence of such an argument is not, as the petitioners imply, indicative of an arbitrary and uninformed mistake but, rather, suggests that, upon verification, Commerce *independently* uncovered evidence that contradicted its initial conclusion. The court finds this change compelling.

The petitioners lengthy argument that there is no difference in the record between the nature of tolled sales and non-tolled sales is unavailing. As is frequently pointed out by Commerce and the domestic producers in other antidumping cases, "[e]ven if it is possible to draw two inconsistent conclusions from the evidence contained in the record, this does mean that Commerce's findings are not supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966). Commerce clearly stumbled upon something that caused it to reconsider and reverse its position. It is ultimately Commerce's responsibility to weigh the evidence and the court need only determine whether a determination has proper

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[7] Corus initially argued that all of its sales, both tolled and non-tolled, should be considered EP. *See* Corus' Section A Response at A-18.

support. Because there is substantial evidence supporting a direct and exclusive connection between CSBV and the U.S. customer, the court finds that petitioner has not established error with respect to tolled sales. In the absence of a supported request for a remand by the government, no remand is warranted.

II. Corus' Motion

A. Zeroing

In its motion, Corus primarily challenges Commerce's methodology for calculating its weighted-average dumping margin. Commerce calculated the weighted-average dumping margin by aggregating all individual dumping margins. *See Issues and Decision Memorandum for the Antidumping Investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Notice of Final Determination of Sales at Less Than Fair Value (A-421-807)*, from Joseph A. Spetrini to Faryar Shirzad, 66 Fed.Reg. 50,408 (Dep't Commerce October 3, 2001) (*"Issues and Decision Memorandum"*). Commerce concedes that it discounted those transactions where the U.S. price *exceeded* normal value ("NV")—i.e., nondumped sales—by assigning a dumping margin of zero. *Issues and Decision Memorandum* at Comment 1.[8] Corus argues that this methodology, commonly referred to as "zeroing," is an unreasonable interpretation of the statute because it results in a fundamentally unfair comparison that intentionally ignores certain transactions and distorts the final margin.

In both the *Final Determination* and briefing before the court, Commerce responds that the statute *requires* zeroing

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[8] Commerce concedes that some of Corus' sales during the Period of Investigation ("POI") were at or above fair value. Corus contends that, without zeroing, these sales would have resulted in a negative overall weighted average margin and, thus, the investigation would have been terminated. Corus Br. at 10. Commerce does not dispute this conclusion.

when calculating the dumping margin.[9] *See Issues and Decision Memorandum*, Comment 1, ¶ 5 ("This methodology is required by U.S. law."). The petitioners agree, arguing that Commerce correctly recognized that zeroing is mandated after amendments to the statute under the to the Uruguay Round Agreements Act ("URAA"), Pub.L. No. 103-465, 108 Stat. 4809 (1994) (effective January 1, 1995). Prior to the URAA, the Tariff Act of 1930, as amended (the "Act"), did not expressly explain how to calculate a dumping margin or weighted-average dumping margin.[10] Under the URAA, the Act was amended in 1994 to define a dumping margin as "the amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A) (emphasis added). Section 1677(35)(B) was also added to define a weighted average

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[9] Commerce has taken the position that zeroing is mandatory in several determinations. *See, e.g.*, Decision Memorandum in *Stainless Steel Wire Rod from India*, 67 Fed.Reg. 37391 (Dep't Commerce May, 29, 2002) (final results) at Comment 5; Decision Memorandum in *Structural Steel Beams from Spain*, 67 Fed.Reg. 35482 (Dep't Commerce May 20, 2002) (final determ.) at Comment 15; Decision Memorandum in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan*, 66 Fed.Reg. 15078 (Dep't Commerce Mar. 15, 2001) (final results) at Margin Calculations/Assessment Rates Section, Comment 1; Decision Memorandum in *Steel Wire Rope from India*, 66 Fed.Reg. 12759 (Dep't Commerce Feb. 28, 2001) (final determ.) at Comment 8.

[10] Pub.L. 103-465, § 229(b), added paragraph (35) relating to dumping margin and weighted average dumping margin. Corus suggests that, prior to 1994, § 1673(2) contained "virtually identical" language to the 19 U.S.C. § 1677(35)(A) 35(a). The language from section 1673(2) of the earlier statute, which is still contained in similar language at 19 U.S.C. § 1673, provided that an *antidumping duty* shall be imposed in an amount equal to "the amount by which foreign market value exceeds the United States price for the merchandise." While this speaks to the calculation of the margin, it is directed at the calculation of the duty assessed. In any event, the pre-URAA statute certainly did not specifically define the method for calculating a "weighted average dumping margin," the calculation that Corus challenges here.

dumping margin as "the percentage determined by dividing the *aggregate dumping margins* determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." *Id.* (emphasis added). Commerce argues that, taken together, these provisions expressly require that it aggregate only those dumping margins where NV exceeds U.S. price (commonly referred to as "positive" dumping margins).[11]

Even if true, the court fails to see how such a directive translates to mandatory zeroing. If, as Commerce suggests, the statute expressly limited Commerce's inquiry to positive margins, there would be no need to zero negative margins at all—nondumped sales could be disregarded entirely. The truth of the matter is that the statute is silent as to the impact of negative margins.[12] The statute neither requires nor prohibits Commerce from considering nondumped sales. The statute certainly does not direct Commerce to manipulate the value of certain transactions. That Commerce has adopted a zeroing methodology while simultaneously arguing that it need not consider negative margins supports the court's conclusion that the statute is ambiguous on this point. The issue, therefore, is whether Commerce's methodology is a reasonable interpretation of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (requiring reviewing courts to defer to an agency's reasonable interpretation of an ambiguous statute).

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[11] Instances where the U.S. price exceeds NV are commonly referred to as "negative" margins.

[12] The court notes the absence of any reference to zeroing in the Statement of Administrative Action ("SAA") accompanying the URAA, H.R. Doc. 103-316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, which is the "authoritative expression of the by [sic] the United States concerning the interpretation and application of the Uruguay Round Agreements." 19 U.S.C. § 3512(d) (2000).

Corus argues that Commerce's zeroing methodology is unreasonable because it violates the WTO Antidumping Agreement.[13] Corus contends that, under the *Charming Betsy* doctrine, a methodology that violates the Agreement is necessarily an unreasonable interpretation of the underlying statute. *Murray v. Charming Betsy*, 2 Cranch 64, 6 U.S. 64, 118, 2 L.Ed. 208 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ."). Having found that the statute does not clearly require zeroing, the court now turns to whether the WTO Antidumping Agreement clearly prohibits zeroing.

Article 2.4.2 of the Agreement provides that dumping margins shall be established based upon "a comparison of a weighted average normal value with a weighted average of prices of *all comparable export transactions* . . . ." Agreement on Implementation of Article VI of GATT art. 2.4.2 (Apr. 15, 1994) (emphasis added) ("Antidumping Agreement" or the "Agreement"), *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1455 (1994).[14] Corus argues that zeroing

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[13] Commerce argues that 19 U.S.C. § 3512(c)(1) prohibits Corus from arguing that zeroing violates the Antidumping Agreement. "No person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by any . . . agency . . . on the ground that such action or inaction is inconsistent with [the Uruguay Rounds Agreement]." *Id.* As was the case in *Timken Co v. United States*, Corus "is not bringing this action under any WTO agreement; rather, [Corus] is arguing that Commerce's application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement." 240 F.Supp.2d at 1233 (CIT 2002). Thus, Congress cannot be presumed to have approved such an interpretation.

[14] Article 2.4.2 of the Anti-Dumping Agreement provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of

violates Article 2.4.2 because it disregards certain transactions. As explained in *Bowe Passat v. United States*, nondumped transactions are not entirely ignored but are instead assigned a lesser value (zero) and ultimately combined with the value of the dumped sales for the purpose of calculating the overall margin. 20 CIT 558, 570-71, 926 F.Supp. 1138, 1150 (1996). "This inclusion of value has the effect of diluting the dumping margin, making the margin lower than it would otherwise be if . . . these sales were totally disregarded and were not given any credit at all in the analysis." *Id.* at 571-72, 926 F.Supp. at 1150.[15] The court

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all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

[15] In *Bowe Passat*, the court was concerned with this dilution, noting that zeroing "introduces a statistical bias in the calculation of dumping margins" because it allows Commerce to make an affirmative finding of dumping "even if the vast majority of sales made by the subject foreign producers in the United States were at prices higher than the average foreign market value." 20 CIT at 570-71, 926 F.Supp. at 1149 (1996) (citing Ronald A. Cass & Stephen J. Narkin, *Antidumping and Countervailing Duty Law: The United States and the GATT*, in *Down in the Dumps* 200, 205) (Boltuck & Litan eds.1991). The court, however, determined that Commerce's justification for zeroing—to protect against masked dumping—was valid and offset any bias. Finding that the statute itself was silent with respect to zeroing, the court concluded that zeroing was a reasonable methodology under the statute. *Bowe Passat*, 20 CIT at 572, 926 F.Supp. at 1150. ("Unless and until it becomes clear that such a practice is impermissible or unreasonable (because, e.g., Commerce *erroneously* placed too much significance on the phenomenon of masked dumping), the Court must defer to Commerce's chosen methodology.").

therefore cannot find that Commerce completely disregards those transactions.

The court is nevertheless wary of a methodology that intentionally minimizes the impact of nondumped transactions by manipulating the data of potentially equalizing sales. While the court questions whether this manipulation is in the spirit of the Agreement, the Agreement itself does not appear to expressly prohibit this practice. The Agreement merely requires that all sales be considered. As such, zeroing *technically* appears to comply. In fact, the court suspects that Commerce likely maintains its zeroing methodology, despite its protestations that the statute prohibits consideration of negative margins, to insure that it minimally complies with the agreement by "considering" all sales. Regardless, the court finds that the Agreement, in its present form, does not clearly prohibit zeroing.

Corus urges the court to consider a recent WTO Appellate Body finding that zeroing is inconsistent with its interpretation of the Agreement. In *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("*Bed Linen*"), the WTO Appellate Body ruled that a zeroing methodology employed by the E.C. was inconsistent with Article 2.4.2 because it did not take "fully into account" all transactions and, therefore, the E.C. had not made a "fair comparison." Corus argues that Commerce's methodology is similarly inconsistent with the Agreement and the court should, therefore, find the methodology unreasonable under the *Charming Betsy* doctrine.

In *Timken*, the plaintiff challenged zeroing on similar grounds, although in the context of an administrative review. 240 F.Supp.2d 1228 (CIT 2002). Although the court concluded that "[*Bed Linen*] does not invalidate Commerce's zeroing practice," the court noted that it could not determine whether the methodology used by the E.C. in *Bed Linen* was

sufficiently comparable to that of Commerce. *Timken*, 240 F.Supp.2d at 1239. The court pointed out that *Bed Linen* involved an antidumping investigation comparing weighted averages for export prices and normal value, implicating Article 2.4.2 of the Agreement, whereas *Timken* involved an administrative review comparing weighted-average normal values to transaction-specific export prices, implicating Article 9.3.1. Reasoning that the two circumstances were significantly different, the court seems to have determined that *Bed Linen* was inapplicable.[16] This case is more similar to *Bed Linen*.

Like *Bed Linen*, this case is an appeal from an antidumping investigation, not an administrative review. Like *Bed Linen*, Commerce included the use of product groupings within the broader category of subject merchandise. In its margin program, Commerce calculated Corus' weighted-average dumping margin by first comparing the weighted average U.S. price with the weighted-average NV for each product sold in the United States. Dumping margins were calculated for each product group and were determined based on weighted-averages of price comparisons from transactions of products within the group. *See Final Determination* at 5-6. As discussed, if the product group's margin was negative, the margin was changed to zero. The circumstances and methodology in this case appear to be very similar, if not identical, to the *Bed Linen* investigation. *See Bed Linen*, WT/DS141/AB/R ¶ 47.

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[16] As support, the court cited two pre-URAA cases upholding zeroing. *Serampore Indus. Pvt. Ltd. v. Dep't of Commerce*, 11 CIT 866, 874, 675 F.Supp. 1354, 1360-61 (1987); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 20 CIT 558, 572, 926 F.Supp. 1138, 1150 (1996). As discussed, the parties here argue that changes in the URAA and the underlying Agreement have altered the requirements and prohibitions of calculating the dumping margin, therefore, but for this purpose the changes may not be significant.

Despite these similarities, the court concludes that *Bed Linen* cannot be the basis for striking Commerce's methodology. As this court has frequently recognized, WTO decisions are not binding upon Commerce or the court. *See, e.g., Hyundai Elec. Co., Ltd. v. United States*, 23 CIT 302, 311, 53 F.Supp.2d 1334, 1343 (1999); *Footwear Distributors and Retailers of America v. United States*, 18 CIT 391, 852 F.Supp. 1078 (1994). The SAA provides that "[r]eports issued by panels or the Appellate Body under the [WTO Dispute Settlement Understanding] have no binding effect under the law of the United States." SAA at 1032. The SAA goes on to state that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures. . . ." *Id.*

In addition, it appears that WTO decisions are not binding upon the WTO itself. The common law concept of *stare decisis* does not expressly apply to WTO rulings. *Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments—Results of the Uruguay Round*, Annex 2, vol. 31, 33 I.L.M. 1226 (1994), art. 3(2). As a result, WTO decisions appear to have very limited precedential value and are binding only upon the particular countries involved. They are not binding upon other signatory countries or future WTO panels.[17]

While this court has acknowledged that WTO decisions may help inform its decisions, *Hyundai*, 23 CIT at 312, 53 F.Supp.2d at 1343, the court concludes that it cannot solely

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[17] While commentators argue that there is de facto *stare decisis* within the WTO and that future panels do in fact follow previous decisions, *see, e.g.*, Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (pt. 2)*, 9 J. TRANSNAT'L L. & POL'y 1, 1-3 (1999), the fact remains that these decisions have no express legal effect beyond the boundaries of the particular case.

rely upon a non-binding interpretation of an international agreement as grounds to strike a United States agency interpretation of a statute. When faced with an ambiguous statute and ambiguous international agreement, the court should defer to Commerce's interpretation. *See Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed. Cir.1995) ("Commerce is due judicial deference in part because of its established expertise in administration of the Act, and in part because of 'the foreign policy repercussions of a dumping determination.'") (quoting *Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States*, 713 F.2d 1568, 1571, 1 Fed. Cir. 130, 131 (1983), *cert. denied*, 465 U.S. 1022, 104 S.Ct. 1274, 79 L.Ed.2d 679 (1984)). After all, zeroing is not new. Congress was presumably aware of the practice when it enacted the URAA. *See, e.g., supra* note 15 and cases cited therein. Congress could have prohibited zeroing if it so chose. Instead, Congress enacted a statute that, at least, arguably encourages zeroing by referring only to dumping margins where the U.S. price exceeds NV. As a result, the court cannot find that zeroing is an unreasonable application of the statute as it is presently written.

B. Affiliated Sales

Corus next argues that Commerce erroneously found that Laura Metaal Holding BV ("Laura"), a steel service center located in the Netherlands, was affiliated with CSBV. Section 771(33)(F) of the Tariff Act of 1930, as amended (the "Act"), defines "affiliated" as "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person." 19 U.S.C. § 1677(33)(F). The statute provides that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33). "The determination of 'control' under the URAA is . . . not dependent on actually exercising control,

but rather on the *capacity* to exercise control." *Ferro Union v. United States*, 44 F.Supp.2d 1310, 1324 (CIT 1999) (emphasis in original).

Commerce generally finds control to exist where the relationship "has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product." 19 C.F.R. § 351.102(b). Commerce considers factors such as "corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships." *Id.* After reviewing the various ownership interests and structure of Laura's Supervisory Board, Commerce determined that Corus and Laura were affiliated through the common control of Koninklijke Hoogovens NV ("KHNV") and, ultimately Corus Group PLC ("Corus Group"). *Issues and Decision Memorandum* at Comment 2.

Corus Group is the owner and parent of numerous steel production related companies. *See* Supp. Section A Response at Ex. A-4. Corus Group was established in October 1999 as a result of a merger between KHNV and British Steel plc. *See id.* at A-7, n. 4. KHNV is now a holding company for Corus Group and does not engage in the production of steel itself. *Id.* at A-7. Respondents CSBV and Corus Steel USA Inc. ("CSUSA") are wholly owned subsidiaries of KHNV. *Id.* at A-8. As discussed, CSBV is the sole producer of subject hot-rolled steel in the Netherlands and is responsible for home market and export operations. *Id.* at A-7, A-10 to A-11. CSUSA acts as an agent for CSBV in the United States. *Id.* at A-8 to A-9. Laura and Namascor BV ("Namascor") are two home market service centers related to Corus Group. *Id.* at A-3 to A-4.[18] Laura is both a consumer of subject

[18] Namascor is a [ ]. CD 11 at Ex. A-4. Namascor decoils and cuts subject merchandise purchased from CSBV and resells the steel in sheets to unaffiliated customers. *See id.* at A-3, Ex. A-7.

merchandise for use in its manufacturing operations and a reseller of subject merchandise through its service center functions. *Id.* at A3 to A-4. Laura is owned by three companies including KHNV, the parent corporation of CSBV.[19] After reviewing the equity ownership and structure of Laura, Commerce determined that CSBV and Laura were affiliated, concluding that both were under the common control of KHNV and, thus, the Corus Group. *Decision Memorandum* at Comment 2. Corus does not dispute that CSBV is under the control of the Corus Group by virtue of KHNV's 100 percent ownership of CSBV. *See* Corus Br. at 26. Corus challenges Commerce's conclusion with respect to Laura, arguing that KHNV does not have a sufficiently significant ownership interest in Laura to exert control.[20]

Corus concedes that a 1992 Shareholder's Agreement revised share ownership for the express purpose of eliminating KHNV's prior majority interest in Laura. *See* Section A Response at Exhibit A-4 ("Shareholder's Agreement").[21] As a result, KHNV is now a minority owner, although it

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[19] KHNV has a [ ] ownership interest. [ ], a privately owned investment company, has [ ] ownership interest. [ ], an unaffiliated bank, owns [ ].

[20] The court notes that, in another proceeding before Commerce since the Shareholder's Agreement, the Corus Group and KHNV have reported that Laura is an affiliated party. *See id.;* Affiliation Memorandum at 3-4. Corus has not established any change in the relationship since that time that would justify a change in the affiliation status of Laura. At oral argument, Corus downplayed the previous submission, claiming that it was a mistake. *See* Oral Argument Transcript at 18.

[21] The Shareholder's agreement was actually originally entered into by Hoogovens Industriele Toeleveringsbelrijven BV ("HIT"), a subsidiary of KHNV. KHNV subsequently acquired the interest of HIT upon the closure of that company. The 1992 Agreement reduced HIT's interest from [ ] to [ ] by transferring [ ] to the bank. *See* Sales Verification, Ex. 20.

continues to own substantial percentage of the shares of Laura.[22] Minority ownership, however, is not dispositive.

Congress amended the affiliation statute as part of the URAA to allow Commerce to consider factors other than equity ownership as indicia of affiliation. The SAA explains that the current law introduces the concept of "control" because "[t]he Administration believes that including control in the definition of 'affiliated' will permit a more sophisticated analysis which better reflects the realities of the marketplace." SAA at 838. The SAA goes on to explain that:

> The traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm "operationally in a position to exercise restraint or direction" over another *even in the absence of an equity relationship.* A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.

SAA at 838 (emphasis added).

While not always conclusive, equity ownership remains a highly relevant consideration in determining whether parties are affiliated through common control under Section 771(33)(F) of the Act. *See, e.g., Mitsubishi Heavy Industries, Ltd. v. United States*, 54 F.Supp.2d 1183, 1192 (CIT 1999) (holding that a minority shareholder may be found to control a company if its ownership interest is significant and puts the shareholder "legally or operationally in a position" to exercise restraint or direction over the company).[23] The court finds

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[22] With [ ] percent of the shares, KHNV remains one of the [ ] largest shareholders in Laura.

[23] Accordingly, Commerce has frequently found control to exist where the corporation owns a smaller percentage of equity than here. *Stainless*

that KHNV's [ ] percent ownership interest is sufficient to suggest the capacity for control.

The court further finds that KHNV and the Corus Group also have the potential to exercise control over Laura's operations and management through KHNV's ability to appoint members of Laura's Supervisory Board (the "Board").[24] Under the Shareholder's Agreement, KHNV has the ability to nominate [ ] voting members on the Supervisory Board. *See* Verification Exhibits at Exhibit 2, Article 5.1, Corus' Appendix at Exhibit 11. KHNV also nominates one of the two non-voting advisors to the Board. *See* Section A Response at A-4, Corus' Appendix at Exhibit 3 (Public Version).

Under the Shareholder's Agreement, the Board has ultimate control over the operations and management of Laura.[25] Through its ability to nominate [ ] percent of the voting members and 50 percent of the non-voting advisors to the Board, KHNV may have substantial power to direct the activities of Laura and certainly has the ability to restrain production, pricing, and other decisions by blocking particular votes.[26] Accordingly, the court finds that there is

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Steel Sheet and Strip From Mexico, 64 Fed.Reg. 30790, 30797 (Dep't Commerce June 8, 1999) (final determ.) ("*Stainless Steel Sheet and Strip From Mexico*") (finding control where party had ownership interest of 36 percent); *Stainless Steel Sheet and Strip From Italy*, 64 Fed.Reg. 30750 at 30762 (finding control where party had ownership interest of 33.75 percent); *CTL Plate From Brazil*, 62 Fed.Reg. 18486 at 18490-91 (finding control where party had ownership interests of 20.3 percent and 8 percent in relevant companies).

[24] The Shareholder's Agreement provides that Laura is to have a [ ] voting "Supervisory Board," consisting of [ ] members appointed by HIT, the former subsidiary of KHNV. *See* Verification Exhibits at Exhibit 2, Article 5.1. As explained *supra* note 21, HIT's interest in Laura was subsequently acquired by KHNV upon the closure of HIT.

[25] The Board [ ]. *See* Verification Exhibits at Exhibit 2, Article 4.

[26] [ ]. *See* Verification Exhibits at Exhibit 2, Article 4, Corus' Appendix at Exhibit 11 (APO Version) at Exhibit 2, Article 6.3.

substantial evidence to support Commerce's conclusion that KHNV's significant equity ownership in Laura and its representation on Laura's Board would allow it to exercise restraint or direction over Laura's operations and management. *See Issues and Decision Memorandum* at Comment 2. The court finds no error in Commerce's determination that Laura and CSBV are affiliated.

C. Non-Prime Sales

Corus next argues that Commerce erred by including certain sales by GalvPro LP ("GalvPro"), a joint venture company owned by Weirton Steel Corporation and Corus Coatings USA. Corus argues that sales of defective hot-rolled steel by GalvPro should have been excluded because those transactions were outside the ordinary course of trade and not representative of GalvPro's other galvanized steel products. Commerce responds that there is no requirement that it exclude sales outside the ordinary course of trade and that it properly compared these U.S. sales to similar sales in the home market. The court agrees.

GalvPro was formed to construct and operate a single-line manufacturing facility for the treatment of cold-rolled full hard steel to produce galvanized steel products. These products were not subject to the underlying investigation. During the POI, GalvPro purchased a limited amount of hot-rolled material from CSBV due to a temporary shortage of cold-rolled steel, the normal input for GalvPro's production. *See* Corus' January 18, 2001 Letter To Commerce at 2; Corus' February 1, 2001 Section A Response at A-10. After importation, the hot-rolled steel was cold-rolled and galvanized by GalvPro. During this process, some of the resulting galvanized steel was damaged and, consequently, was sold at substantially reduced prices.[27] Corus sought to

[27] The defective product amounted to [ ] metric tons with a total sales value (gross unit price times quantity) of [ ] (compilation of sales

have these sales excluded from Commerce's margin program on the grounds that they were unrepresentative of Corus' U.S. sales and, therefore, outside of the ordinary course of trade.[28]

"Commerce calculates an antidumping duty by comparing an imported product's price in the United States to its normal value . . . . (i.e., the price of comparable merchandise in the exporting country)." *FTC*, 41 F.Supp.2d at 323. As previously explained, the U.S. price may be either EP, which is used when the foreign exporter sells directly to an unrelated U.S. customer, or CEP, which is used when the foreign exporter sells through an affiliated party in the United States. *Id.*; 19 U.S.C. § 1677a(a) and (b). The NV is "the price at which the foreign like product is first sold . . . . for consumption in the exporting country in the usual commercial quantities and *in the ordinary course of trade*." 19 U.S.C.

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identified as secondary quality on Corus' U.S. sales listing) which was part of Corus' response to Section C of Commerce's questionnaire. *See* Corus' April 23, 2001 Quantity Value Reconciliation at A-2. Corus argues that this product was sold at slightly more than scrap value however, the record shows that Galvpro received an average of [ ] per metric ton of scrap. The average price of the Galvpro non-prime merchandise, on the other hand, was [ ] per metric ton—[over four times the average value of scrap]. *See* Petitioners' Rebuttal Brief to Commerce (Aug. 6, 2001) at 11 and Attachment 1. The court finds this difference significant.

[28] Corus argues that, among other things, these sales are distortive because Corus' sales to GalvPro were of a limited duration. Corus argues that there is no possibility of future shipments because GalvPro has now ceased production and has filed for bankruptcy protection. GalvPro filed for Chapter 11 protection in August, 2001 and for conversion to Chapter 7 in March, 2002. Corus asks the court to take judicial notice of the bankruptcy. This information was not contained in the administrative record of the underlying investigation, and thus, was not part of Commerce's consideration in the final determination. More importantly, whether GalvPro remains in existence is irrelevant to Commerce's analysis of transactions that occurred during the POI. The court, therefore, declines to take judicial notice of this bankruptcy for the purposes of reviewing the *Final Determination*.

§ 1677b(a)(1)(B)(i) (emphasis added). While the definition for NV requires that Commerce consider the price of sales in the "ordinary course of trade," the definitions of U.S. price contain no such requirement. 19 U.S.C. § 1677a(a) and (b); 19 C.F.R. § 351.402.

The court has previously recognized that the calculation of U.S. price may include sales outside the "ordinary course of trade." In *IPSCO, Inc. v. United States*, 687 F.Supp. 633 (CIT 1988), *rev'd on other grounds*, 965 F.2d 1056 (Fed. Cir.1992), the court concluded:

> [T]he court may assume that if Congress intended to require the administering authority to exclude all sales made outside the 'ordinary course of trade' from its determination of United States price it could have provided for such an exclusion in the definition of United States price, as it has in the definition of foreign market value. It has not done so.

Id. at 641. In *FAG Italia, S.p.A. v. United States*, 948 F.Supp. 67, 71 (CIT 1996), the court agreed, stating that "unlike the definition of FMV [foreign market value or NV], the definition of USP [U.S. price or EP/CEP] contains no requirement that the prices used in USP calculations be the prices charged 'in the ordinary course of trade.'" As a result, even if Corus is correct that these GalvPac sales were made outside of the ordinary course of trade, there is no requirement that Commerce exclude them.

Where a respondent sells secondary or non-prime merchandise in the United States, it is Commerce's standard practice to include those transactions in its margin calculation by attempting to match these sales to non-prime sales in the home market. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Italy*, 64 Fed.Reg. 30,750, 30,753 (June 8, 1999) (matching non-prime U.S. sales to non-prime sales in

the home market in the margin analysis); *Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Korea*, 58 Fed.Reg. 37176, 37183 (Dep't of Commerce July 9, 1993)(same). Even where there is no match in the home market, Commerce can assign a constructed value for these sales. 19 U.S.C. § 1677b(a)(4).

This court has previously upheld this practice, stating that "Commerce's interpretation of the United States price provision of the antidumping statute to include all United States sales whether in or out of the ordinary course of trade is a permissible construction of the statute." *Bowe Passat*, 926 F.Supp. at 1148. Consistent with that position, Commerce attempted to match Galvpro's non-prime sales and included those transactions in the final margin calculation here. *Issues and Decision Memorandum* at 10 (Comment 3). There is no inherent error in doing so.

While Commerce generally attempts to match non-prime sales, Commerce may, in certain circumstances, disregard U.S. sales where those transactions are unrepresentative and extremely distortive. *See, e.g., FAG U.K. Ltd. v. United States*, 945 F.Supp. 260, 264, 265 (CIT 1996) ("*FAG U.K.*"); *FAG Italia S.p.A. v. United States*, 948 F.Supp. 67, 71 (CIT 1996). In *FAG U.K.*, the Court recognized that the statute "does not require that absolutely every U.S. sale of merchandise under investigation be included in every case." *FAG U.K.*, 945 F.Supp. at 265.[29] Citing *Ipsco v. United States*, 714

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[29] Commerce does not dispute that, in certain cases, it has excluded U.S. transactions in its margin calculation. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors From the Republic of Korea*, 62 Fed.Reg. 51437, 51438 (Oct. 1, 1997) (excusing the respondent from reporting certain U.S. sales

F.Supp. 1211, 1217 (1989), *rev'd in part*, 965 F.2d 1056 (Fed.Cir.1992). In *FAG U.K.*, the court determined that transactions may be excluded "'in those situations in which [Commerce] finds that inclusion of certain sales which are clearly atypical would undermine the fairness of the comparison of foreign and U.S. sales.'" 945 F.Supp. at 265 (citation omitted). In these cases, however, the court was discussing the limitations upon Commerce's discretion to exclude sales. The court was not creating a *requirement* that Commerce exclude certain sales. In sum, the court finds that Commerce did not err in comparing GalvPro sales to non-prime sales in the home market.

D. Level of Trade Adjustment

Corus argues that Commerce erred in denying Corus a level of trade ("LOT") adjustment with respect to sales in the home market by two steel service centers. In calculating the margin, the statute provides for an adjustment to NV if the U.S. sale is made at a different LOT from the comparison market sale, and certain factors are satisfied. 19 U.S.C. § 1677b(a)(7)(A); *see also Prodotti Alimentari Meridionali, S.R.L. v. United States*, slip op. 02-68, 2002 WL 1585672, *3 (CIT July 16, 2002). The regulation provides that "[t]he Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent)." 19 C.F.R. § 351.412(c)(2) (2002). The SAA provides that, in order to find that two LOTs are different, one requisite factor is "a difference between the

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after concluding that the value of the further processed sales at issue did not justify the extensive expenditure of Commerce resources that analyzing the sales would have required); *See also NSK Ltd. v. United States*, 969 F.Supp. 34, 44 (CIT 1997) (excluding free samples from U.S. sales because they provided no consideration in either the home or U.S. markets); *Chang Tieh Indus. Co. v. United States*, 840 F.Supp. 141, 146 (CIT 1993) (stating that Commerce may disregard non-bona fide sales to prevent fraud upon its proceedings).

actual functions performed by the sellers at the different levels of trade in the two markets." SAA at 829. To qualify for a LOT adjustment, therefore, "a party has the burden to show that the following two conditions have been satisfied: (1) the difference in LOT involves the performance of different selling activities; and (2) the difference affects price comparability." *Timken*, 240 F.Supp.2d at 1233; *see also Torrington Co. v. United States*, 146 F.Supp.2d 845, 876 (2001); *Koyo Seiko Co., Ltd. v. United States*, 8 F.Supp.2d 862, 864 (CIT 1998). The parties here dispute the former.

In conducting its investigation, Commerce requested that Corus report and explain the different LOTs according to the selling function performed and sales services offered to its home market customers. *See* Commerce's Antidumping Duty Questionnaire (Jan. 4, 2001) at A-6 to A-7. In response, Corus described the selling activities that it and its affiliated service center, Namascor BV, perform for their home market sales. Corus' Section A Response at A-19 to A-33, Exhibit A-8 P.R. 45.

Because Corus initially claimed that Laura was unaffiliated, Corus did not submit complete data for Laura. In a supplemental response issued after Commerce concluded that Laura was an affiliate, Corus stated that Laura's "operations and customer base is such that the activities it performs on behalf of its customers is clearly more similar to that of Namascor than that of Corus." Corus' Response to the Department's Supplemental Sections A-E Questionnaire (Apr. 4, 2001) ("Suppl.A-E") at B-11 Corus' Appendix at Exhibit 6 (Public Version). Because Corus did not present an explanatory narrative with respect to Laura and because the burden is upon Corus to establish a different LOT, the court considers only whether Namascor should have been granted a LOT adjustment.

With respect to Namascor, Corus reported eleven (11) total selling functions in the home market. NPD 11 at A-19 to

A-33, Ex. at A-8.[30] After evaluating Corus' description of strategic and economic planning, advertising, freight and delivery arrangements, technical/warranty services, and sales logistics support, Commerce determined that both Namascor and CSBV performed these five (5) selling activities in a similar manner. *Issues and Decision Memorandum* at 11. Corus itself reported that neither performed three (3) of the remaining selling functions for its home market customers.[31] With respect to the final (3) three selling functions (market research, research and development, and warehousing), Commerce noted some differences between the functions of CSBV and Namascor, but ultimately concluded that these differences were not significant and did not represent sales at separate LOTs. *Id.* at 12. As a result, Commerce determined that the selling activities of CSBV and Namascor did not differ significantly and, therefore, that both had made sales in the home market at the same LOT. *Issues and Decision Memorandum* at 11-12.

As it did during the investigation, Corus argues that steel service centers inherently operate at a different LOTs. In *Hot-Rolled Steel Products From Argentina, China, India, Indo-*

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[30] These selling functions were listed as: (1) Strategic and Economic Planning; (2) Market Research; (3) Advertising; (4) Inventory Maintenance; (5) Warehousing; (6) Freight and Delivery Arrangements; (7) Assistance on Computer / Legal / Accounting / Audit/Personnel Programs; (8) Procurement / Sourcing / Communication Services; 9) Technical / Warranty Services; (10) Engineering / R & D/ Product Development Services; and (11) Sales Logistic Support. NPD 11 at A-19 to A-33, Ex. at A-8.

[31] *See* NPD 11 at A-23 (for Inventory Maintenance "[n]either CSBV nor Namascor performs this activity for its customers"); *id.* at A-27 (for Assistance on Computer/Legal/Accounting/Audit/Personnel Program "[n]either CSBV nor Namascor performs this service for its customers, however, both companies perform these activities for internal purposes."); *id.* (for Procurement/Sourcing/Communications Services, neither performs the service).

nesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine, Inv. Nos. 701-TA-404-408, 731-TA-898-908, USITC Pub. 3381 at I-8, and in n. 24 (Jan.2001) (prelim.det.), the International Trade Commission ("ITC") agreed, finding that steel service centers perform two key functions different from manufacturers: (1) "Many service centers maintain extensive inventories of a variety of steel products, providing availability and inventory management services for customers of all sizes, including those with smaller purchasing needs that must place low-volume orders"; and (2) "[s]ome service centers perform a wide range of value-added processing, such as uncoiling, flattening, and cutting flat-rolled products to length or burning hundreds of intricate parts from a single sheet." *Id.* at I-8 n. 24. Corus argues that, like most service centers, Namascor offers warehousing services and markets a variety of value-adding products and services, such as cutting, decoiling, cutting-to-length, etc., which are significantly different from those available from CSBV. *See* Corus' February 1, 2001 Section A Response at A-3-4 & Ex. A-14; Corus' April 4, 2001 Laura Section B Response at B-1.

Unlike the ITC, Commerce has not explained whether its generally finds that producers and service centers operate at the same LOT—but there is no requirement that it do so. Rather than broadly differentiating between types of sellers, Commerce compares the observations of different selling functions, which is consistent with statute, regulation, and SAA. The court finds no error in applying this quantitative analysis generally. While the court has expressed concerns with a purely quantitative comparison that does not account for qualitative differences in selling functions, *Prodotti Alimentari Meridionali, S.R.L. v. U.S,* 2002 WL 1585672, *2, Slip op. 02-68 (CIT 2002), Corus does not challenge the *Final Determination* on this ground. Corus instead attacks Commerce's findings with respect to individual functions. For example, Corus argues that Commerce erred in con-

cluding that CSBV and Namascor perform similar "Technical / Warranty Services." Pls. Br. at 37. Review of the record, however, indicates that, while the services may vary slightly in regard to the size of the technical service department or type of complaints addressed, both CSBV and Namascor offered comparable services.[32] Corus also challenges Commerce's findings with respect to "Sales Logistics Support" and "Warehousing," although Corus does not clearly articulate how Commerce erred in its analysis other than to repeatedly proclaim that Commerce ignored inherent differences. It is worth repeating that Corus bears the burden of establishing that it is entitled to a LOT adjustment. 19 C.F.R. § 351.401(b)(1) (2002); *Timken Co. v. United States, et al.*, 209 F.Supp.2d 1373, 1381-82 (CIT 2002). The court finds that Corus has not met its burden here.

E. Extension of Provisional Measures.

Corus last argues that collection of duties based upon provisional measures after October 30, 2001 was unlawful.

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[32] In the case of CSBV, Corus reported:

> In the event of a complaint, CSBV's technical service representative will discuss the problem with the customer and determine whether CSBV will compensate the customer for the defect. This decision can be made either over the phone or following a visit to the customer location, or following a review of a sample of the allegedly defective merchandise to determine the nature of the problem.

Issues and Decision Memorandum at NPD 11 at A-21, A-31 at A-28. In the case of Namascor, Corus reported:

> [It] also performs technical service and warranty functions in the home market. These are performed by a very small quality department and relate to the correction of defects with regard to decoiling only. Upon receiving a complaint, Namascor personnel will contact the customer regarding the complaint, investigate and decide if the complaint is warranted. This may involve phone conversations or visits to the customer.

Id. at A-29.

Commerce issued its preliminary determination in this matter on May 3, 2001. 66 Fed.Reg. 22,146 (May 3, 2001). Corus subsequently requested an extension of the final determination pursuant to 19 C.F.R. § 353.210(b). In its request, Corus agreed to an extension of provisional measures from a four-month period to not more than six months. *See* Corus' May 22, 2001 Letter to Commerce. This agreement was required by regulation, 19 C.F.R. § 351.210(e)(2), and reflects the limitation on provisional measures set forth in 19 U.S.C. § 1673b(d) that prohibits the assessment of antidumping duties during the gap period after the expiration of the six month period until issuance of the order. *See F.Lli De Cecco Di Filippo Fara San Martino S.P.A. v. United States*, 21 C.I.T. 1130, 1137-40, 1997 WL 615693 (1997) ("The strong wording in . . . 19 U.S.C. § 1673b(d) and the corresponding sections of the Antidumping Agreement suggests that the GATT signatories meant to put a strict limit on the imposition of provisional measures, particularly because of the harshness of the penalties involved, and that Congress has now dealt specifically with the GATT requirement.").

Commerce granted postponement and stated that it would issue its final determination by September 15, 2001. *Postponement of Final Determination for Antidumping Duty Investigation: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed.Reg. 32,600 (Dep't Commerce June 15, 2001). Because of the events of September 11, the antidumping order was not issued until November 29, 2001. *See Antidumping Duty Order: Certain Hot-rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed.Reg. 59565 (November 29, 2001).

Corus argues, and Commerce agrees, that the provisional measures should not have been collected more than six months after the preliminary injunction was issued on May 3, 2001. Commerce admits that it inadvertently excluded appropriate language from the antidumping order that would lift the

suspension of liquidation six months after the *Preliminary Determination*. Commerce requests remand on this issue in order for the agency to insert the appropriate language to correct what it claims is a ministerial error.[33] While the parties agree that remand is appropriate, the parties disagree as to the final date for collection of the provisional measures.

Corus argues that, because Commerce has previously interpreted six months to consist of 180 days,[34] provisional measures should not have been collected after October 30, 2001 (180 days after May 3, 2001). Commerce argues that six months is six months and that the provisional measures were properly collected through November 3 (184 days). Corus argues that there is no standard practice and, when asked at oral argument, Commerce was unable to articulate one. Upon remand, Commerce must explain its practice in such matters and revise the order consistent with that practice.

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[33] Commerce states that it customarily includes language lifting the suspension of liquidation during this "gap period" in its final orders as evidenced by language in a concurrent investigation. *See, e.g., Notice of Antidumping Duty Orders: Certain Hot-Rolled Carbon Steel Flat Products From Argentina and the Republic of South Africa*, 66 Fed.Reg. 48242, 48243 (September 19, 2001).

> These antidumping duties will be assessed on all unliquidated entries of imports of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after May 3, 2001, the date of publication of the preliminary determinations in the Federal Register, and before September 3, 2001, the date Commerce was required, pursuant to section 733(d)(3) of the Act, to terminate the suspension of liquidation.

Id.

[34] *See, e.g., Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Antidumping Investigation of Low Enriched Uranium from France*, 67 Fed.Reg. 6680 (Feb. 13, 2002).

CONCLUSION

For the foregoing reasons, the court finds that the government's vague request for a remand is insufficient and that Commerce's determination with respect to Corus' tolled sales is otherwise supported by substantial evidence. The court further finds that zeroing is neither required by the URAA nor expressly prohibited by the WTO Antidumping Agreement and is a reasonable interpretation of the statute as it is presently written. The court finds that Commerce's finding that Laura and CSBV are affiliated is supported by substantial evidence and that Corus has not established that a LOT adjustment is warranted for its affiliated steel service centers. The court remands this matter to Commerce for the sole purpose of revising its antidumping order to preclude collection of provisional measures beyond the six month period.

So ordered.

APPENDIX D

NOTICES

DEPARTMENT OF COMMERCE

International Trade Administration

[A-421-807]

Notice of Amended Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of amended final determination of sales at less than fair value.

EFFECTIVE DATE: November 2, 2001.

FOR FURTHER INFORMATION CONTACT: Melissa Blackledge, Mike Heaney, or Robert James, Antidumping and Countervailing Duty Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, at (202) 482-3518, (202) 482-4475, or (202) 482-0649, respectively.

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Tariff Act) by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations refer to the regulations codified at 19 CFR part 351 (2000).

Amendment to the Final Determination

On September 21, 2001, the Department determined that certain hot-rolled carbon steel flat products (hot-rolled) from the Netherlands are being, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735(a) of the Tariff Act. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands, 66 FR 50408 (October 3, 2001) (Final Determination). On October 3, 2001, respondent Corus Staal BV (Corus Staal) timely filed an allegation that the Department had made two ministerial errors in its final determination. Petitioners (United States Steel LLC, Bethlehem Steel Corporation, Gallatin Steel Company, IPSCO Steel, Inc., LTV Steel Company, Inc., National Steel Corporation, Nucor Corporation, and Steel Dynamics, Inc.) also timely alleged several ministerial errors on October 3, 2001. Both interested parties requested that we correct the errors and publish a notice of amended final determination in the Federal Register. See 19 CFR 351.224(e). In addition, on October 9, 2001, petitioners filed comments in rebuttal of one of Corus Staal's alleged errors.

Corus Staal's submission alleges the following errors:

- The Department inadvertently applied the revised inland freight expense for sales by Rafferty-Brown of North Carolina (RBN) to all U.S. sales; and

- The Department inadvertently treated all U.S. sales as export price (EP) sales when it intended to treat only sales of tolled subject merchandise as EP sales.

See Letter, Steptoe & Johnson LLP, October 3, 2001 passim.

In their rebuttal submission petitioners note that the treatment of all U.S. sales as EP sales by the Department was not a ministerial error, and that the Department intended to treat all U.S. sales as EP sales.

Petitioners' submission alleges the following errors:

- The Department double-counted early payment discounts for both Laura Metaal BV and Namascor BV;

- The Department double-counted a rebate for one customer which was reported incorrectly as a billing adjustment and correctly as a rebate;

- The Department inadvertently applied the revised warranty expense factor for sales made by RBN to all U.S. sales instead of only to RBN sales;

- The Department failed to correctly adjust the billing adjustments for certain U.S. sales on an invoice-specific basis, the Department applied an adjustment rate to all U.S. sales and not only to the sales in question, the Department then failed to recalculate credit for the invoices in question, and the Department applied the incorrect factor to adjust the respondent's billing adjustments;

- The Department attempted but failed to adjust further manufacturing costs for certain sales by Rafferty-Brown of Connecticut; and

- Finally, the Department inadvertently omitted changes in the margin calculation and model match programs which would have revised costs for one model, as intended by the Department and stated in its Memorandum from Heidi Norris to Neal Halper, Director of Office of Accounting, re: Cost of Production and Constructed Value Calculation Adjustments for the Final Determination (Sept. 19, 2001) at 1-2.

See Letter, Skadden, Arps, Slate, Meagher & Flom LLP, October 3, 2001 passim.

The Department's regulations define a ministerial error as one involving "addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication or the like, and any other similar type of

unintentional error which the Secretary considers ministerial." 19 CFR 351.224(f).

After reviewing both parties' allegations and petitioners' rebuttal we have determined, in accordance with 19 CFR 351.224, that the Final Determination includes several ministerial errors. As to Corus Staal's allegations, we agree with Corus Staal that each of the points raised by Corus Staal constitutes a ministerial error. See Memorandum For Richard Weible; "Allegations of Ministerial Errors; Final Determination in the Investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands' (Ministerial Errors Memorandum), dated October 23, 2001, a public version of which is on file in room B-099 of the main Commerce building, and the Final Determination, 66 FR at 50408.

Finally, we agree that, with the exception of one allegation, the errors alleged by petitioners represent ministerial errors and have been corrected for this amended final determination. The alleged ministerial error with which we do not agree is petitioners' belief that the Department's methodology for adjusting the respondent's billing adjustments constituted a ministerial error. For a detailed description of each of these allegations and, where applicable, our resultant corrections, see the Ministerial Errors Memorandum. Therefore, in accordance with 19 CFR 351.224(e), we are amending the final determination of the antidumping duty investigation of certain hot-rolled carbon steel flat products from the Netherlands. The revised weighted-average dumping margins are in the Amended Final Determination section, below.

Scope of the Investigation

For purposes of this investigation, the products covered are certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in

coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4.0 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of this investigation. Specifically included within the scope of this investigation are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such silicon and aluminum.

Steel products to be included in the scope of this investigation, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products in which:(i) Iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or

1.25 percent of nickel, or
0.30 percent of tungsten, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this investigation unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this investigation:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including, e.g., ASTM specifications A543, A387, A514, A517, A506).

- Society of Automotive Engineers (SAE)/American Iron and Steel Institute (AISI) grades of series 2300 and higher.

- Ball bearings steels, as defined in the HTS.

- Tool steels, as defined in the HTS.

- Silico-manganese (as defined in the HTS) or silicon electrical steel with a silicon level exceeding 2.25 percent.

- ASTM specifications A710 and A736.

- USS Abrasion-resistant steels (USS AR 400, USS AR 500).

- All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).

- Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTS.

The merchandise subject to this investigation is classified in the HTS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90.

Certain hot-rolled flat-rolled carbon steel flat products covered by this investigation, including: vacuum degassed fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTS subheadings are provided for convenience and U.S. Customs purposes, the written description of the merchandise under investigation is dispositive.

Amended Final Determination

We are amending the final determination of the antidumping duty investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands to reflect the correction of the above-cited ministerial errors. The revised final weighted-average dumping margins are as follows:

Manufacturer/exporter	Weighted-average margin (percent)
Corus Staal BV (Corus Staal)	2.59
All Others	2.59

Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Tariff Act, we are directing the United States Customs Service (Customs) to continue suspending liquidation on all imports of the subject merchandise from the Netherlands. Customs shall require a cash deposit or the posting of a bond equal to the weighted-average amount by which normal value exceeds the export price as indicated in the chart above. These suspension-of-liquidation instructions will remain in effect until further notice.

ITC Notification

In accordance with section 735(d) of the Tariff Act, we have notified the International Trade Commission of our amended final determination. This determination is issued and published in accordance with section 736(d) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: October 24, 2001.

Richard W. Moreland,

Acting Assistant Secretary, for Import Administration.

APPENDIX E

NOTICES

DEPARTMENT OF COMMERCE

International Trade Administration

[A-421-807]

Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 3, 2001.

ACTION: Notice of final determination of sales at less than fair value.

FOR FURTHER INFORMATION CONTACT: Melissa Blackledge, Mike Heaney, or Robert James at (202) 482-3518, (202) 482-4475, or (202) 482-0649, respectively; Antidumping and Countervailing Duty Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

The Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Tariff Act) by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to Department of Commerce (Department) regulations refer to the regulations codified at 19 CFR part 351 (April 1, 2000).

Final Determinations

We determine that certain hot-rolled carbon steel flat products (hot-rolled steel) from the Netherlands are being

sold, or are likely to be sold, in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act. The estimated margins of sales at LTFV are shown in the "Suspension of Liquidation" section of this notice.

Case History

We published in the Federal Register the preliminary determination in this investigation on May 3, 2001. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 FR 22146 (May 3, 2000) (*Preliminary Determination*). Since the publication of the Preliminary Determination the following events have occurred.

On May 22, 2001, the Corus Group plc (Corus), the respondent, requested that the Department postpone the final determination the full sixty days as permitted by the statute and the Department's regulations. On June 4, 2001, the Department postponed the final determination until no later than 135 days after publication of the preliminary determination in the Federal Register. *See* 66 FR 32600 (June 15, 2001).

The Department verified sections A through C of Corus Staal BV (Corus Staal's) responses from May 7 through May 11, 2001, at Corus Staal's headquarters in IJmuiden, the Netherlands. The Department also verified section D of Corus Staal's response from May 1 through May 5, 2001, at Corus Staal's headquarters. *See* Memorandum To The File; "Home Market Verification of the Corus Group plc's Questionnaire Response," July 2, 2001 (Home Market Sales Verification Report) and Memorandum To Neal M. Halper, Acting Director, Office of Accounting; "Verification of the Cost of Production and Constructed Value Data Submitted by Corus Staal BV," June 15, 2001 (Home Market Cost Verification Report). From June 6 through June 7, 2001, the Department verified the responses submitted by Corus Staal

relating to Rafferty-Brown of North Carolina (RBN) and Rafferty-Brown of Connecticut (collectively, the Rafferty-Brown Companies), at RBN's offices in Greensboro, North Carolina. *See* Memorandum To The File; "U.S. Verification of the Corus Group plc's Questionnaire Response", July 5, 2001 (U.S. Market Verification Report). Public versions of these, and all other Departmental memoranda referred to herein, are on file in the Central Records Unit, room B-099 of the main Commerce building.

On June 4, 2001, respondent and petitioners requested a public hearing. Petitioners submitted a letter on June 15, 2001, requesting that a product referred to as "battery-quality hot-rolled steel" continue to be included in the scope of the investigation and in any antidumping order to be issued in this case. On July 30, 2001, both the respondent and petitioners filed their case briefs with the Department. On July 31, 2001, petitioners submitted a letter informing the Department of a change in the name of one of the petitioners, from "U.S. Steel Group, a unit of USX Corporation" to "United States Steel LLC". We received rebuttal briefs from all parties on August 6, 2001. The hearing scheduled for August 9, 2001, was cancelled on August 8, 2001, at the request of both parties. Although the deadline for this determination was originally September 17, 2001, in light of the events of September 11, 2001, and the subsequent closure of the Federal Government for reasons of security, the time frame for issuing this determination has been extended by four days.

Period of Investigation

The period of investigation (POI) is October 1, 1999 through September 30, 2000.

Export Price Sales

As a result of our findings at verification we have reclassified certain sales as export price sales because we

determined the sales were concluded between Corus Staal in the Netherlands and the first unaffiliated U.S. customer before the date of importation into the United States. *See* "Final Determination Analysis Memorandum," dated September 21, 2001.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this investigation are addressed in the "Issues and Decision Memorandum" (Decision Memorandum) from Joseph A. Spetrini, Deputy Assistant Secretary, Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, dated September 21, 2001, which is hereby adopted and incorporated by reference into this notice. A list of the issues which parties have raised and to which we have responded is attached to this notice as an Appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public decision memorandum which is on file in B-099.

In addition, a complete version of the Decision Memorandum can be accessed directly on the World Wide Web at *ia.ita.doc.gov/frn/frnhome*. The paper copy and electronic version of the Decision Memorandum are identical in content.

Scope of Investigation

For a description of the scope of this investigation, see the "Scope of Investigation" section of the Decision Memorandum, which is on file in B-099 and available on the Web at *ia.ita.doc.gov/frn/frnhome*.

Use of Facts Available

For a discussion of our application of facts available, see the "Facts Available" section of the Decision Memorandum, which is on file in B-099 and available on the Web at *ia.ita.doc.gov/frn/frnhome*.

Changes Since the Preliminary Determination

Based on our analysis of comments received and findings at verification, we have made certain changes in the margin calculations. We have also corrected certain programming and clerical errors in our preliminary results, where applicable. Any allegations of programming or clerical errors with which we do not agree are discussed in the relevant sections of the "Decision Memorandum," accessible in B-099 and on the Web at *ia.ita.doc.gov/frn/.*

Suspension of Liquidation

Pursuant to section 735(c)(1)(B) of the Tariff Act, we are instructing Customs to continue to suspend liquidation of all entries of certain hot-rolled carbon steel flat products from the Netherlands that are entered, or withdrawn from warehouse, for consumption on or afterMay 3, 2001, the date of publication of the *Preliminary Determination*. The Customs Service shall continue to require a cash deposit or the posting of a bond based on the estimated weighted-average dumping margins shown below. The suspension of liquidation instructions will remain in effect until further notice.

We determine that the following weighted-average dumping margins exist for the period October 1, 1999 through September 30, 2000:

Exporter/Manufacturer	Weighted-average margin (percent)
Corus Staal BV	3.06
All Others	3.06

ITC Notification

In accordance with section 735(d) of the Tariff Act, we have notified the International Trade Commission (ITC) of our determination. As our final determination is affirmative, the ITC will determine, within 45 days, whether these imports are causing material injury, or threat of material injury, to an industry in the United States. If the ITC determines that

material injury or threat of injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping order directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse for consumption on or after the effective date of the suspension of liquidation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Tariff Act.

Dated: September 21, 2001.

Faryar Shirzad,
Assistant Secretary for Import Administration.

Appendix I—Issues in Decision Memo

Comments and Responses

1. The Zeroing Methodology
2. Affiliation
3. Ordinary Course of Trade
4. Level of Trade
5. Interest Factor
6. Scope of the Order
7. Rebates
8. Inventory Carrying Costs
9. Non-prime Merchandise
10. Further Manufacturing Expenses
11. Gross Unit Price
12. Affiliated Party Inputs
13. Allocation of Costs
14. Unreported U.S. Sales
15. Interest Revenue

APPENDIX F

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

[Filed May 18, 2005]

04-1107

CORUS STAAL BV and CORUS STEEL USA INC.,
Plaintiffs-Appellants,

v.

DEPARTMENT OF COMMERCE,
Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,
Defendant-Appellee,

and

NATIONAL STEEL CORPORATION, BETHLEHEM STEEL CORPORATION, STEEL DYNAMICS, INC., IPSCO STEEL INC., GALLATIN STEEL COMPANY, and NUCOR CORPORATION,
Defendants.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS*, and a response thereto having been invited by the court and filed by the APPELLEES[1] and the petition for rehearing having been

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* The Appellants filed a reply to the United States Steel's response.

[1] Separate responses were filed by the United States, and United States Steel Corporation.

referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 25, 2005.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY
Clerk

Dated: May 18, 2005

cc: Gregory S. McCue
Claudia Burke, John J. Mangan

CORUS STAAL BV V COMMERCE, 04–1107
(CIT-02-00003)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX G

A-421-807
POI: 1999-2000
IA/Group III: MB
Public Document

MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
AD/CVD Enforcement Group III

SUBJECT: Issues and Decision Memorandum for the Antidumping Investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Notice of Final Determination of Sales at Less Than Fair Value (A-421-807)

Summary

We have analyzed the comments and rebuttals of interested parties in the antidumping duty investigation of certain hot-rolled carbon steel flat products from the Netherlands (A-421-807). As a result of our analysis, we have made changes, including corrections of certain programming and ministerial errors, in the margin calculations. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments and rebuttals by parties:

1. The Zeroing Methodology
2. Affiliation
3. Ordinary Course of Trade
4. Level of Trade
5. Interest Factor
6. Scope of the Order
7. Rebates

8. Inventory Carrying Costs
9. Non-prime Merchandise
10. Further Manufacturing Expenses
11. Gross Unit Price
12. Affiliated Party Inputs
13. Allocation of Costs
14. Unreported U.S. Sales
15. Interest Revenue

Background

We published in the Federal Register the preliminary determination in this investigation on May 3, 2001. See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 FR 22146

(May 3, 2001) (Preliminary Determination).

The period of investigation (POI) is October 1, 1999, through September 30, 2000. The investigation covers certain hot-rolled carbon steel sales made by one manufacturer/ exporter; the Corus Group plc (Corus Staal BV and Corus Steel USA, Inc.). We invited parties to comment on our preliminary determination. We received case briefs from Corus Staal BV (Corus Staal) and Corus Steel USA, Inc. (Corus USA) and petitioners, (1) on July 30, 2001. We received rebuttal briefs from the same parties on August 6, 2001.

* * * *

Discussion of the Issues

Comment 1. The "Zeroing" Methodology. When calculating weighted-average dumping margins the Department's practice is to aggregate only the dumping margins, disregarding any so-called "negative margins" (i.e., differences between normal value and U.S. price where U.S. price exceeded normal value and, hence, the merchandise was not sold at dumped prices). The Department does this by

setting any "negative margins" equal to zero, a practice referred to here as the "zeroing" methodology. The respondent, all subsidiaries of the Corus Group plc (a holding company), asserts that the Department's use of the "zeroing" methodology is a violation of World Trade Organization (WTO) rules. The Department calculated the weighted average dumping margin for Corus Staal and Corus USA by comparing the weighted average U.S. price with the weighted average normal value for each product sold in the Netherlands. The Department assigned a dumping margin of zero in all instances where the U.S. price exceeded normal value. The respondent asserts the comparisons resulted in a positive value when the normal value exceeded the U.S. price, and the sum of the positive dumping values became the basis of the weighted average margin. Respondent argues that the zeroing methodology is contrary to WTO rules, as determined in the Appellate Body decision in European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (1 March 2001) (Bed Linen). Respondent claims that in this case the EC ignored Indian exports of certain models of bed linen that were not found to be dumped in the EC, while considering only exports of models that were, in fact, being dumped in the EC. According to the respondent, the sales of bed linen models that were dumped were then used to calculate an overall dumping margin, which applied to all product models, even those being sold in the EC at a fair price. The respondent claims that the WTO Appellate Body determined that "zeroing" exports that are not being dumped violated Article 2.4.2 of the Antidumping Agreement because all transactions and all models or types of the product under investigation should be compared to the weighted average normal value. Therefore, the respondent requests that the Department utilize the negative values derived when the U.S. price exceeded normal value in calculating the dumping margin.

Petitioners argue that under the statute, the Department must consider only the sum of the positive dumping margins, i.e., the sales where normal value exceeds U.S. price, in determining the aggregate dumping margin for each importer. Petitioners continue that the Department is not permitted to offset the sum of the positive dumping margins by any "negative" margins, i.e., the amount by which U.S. price exceeds normal value for any particular sale. Petitioner contends that although the WTO Appellate Body ruled that the zeroing methodology used in the Bed Linen case violated the Antidumping Agreement, the decision has no effect on U.S. law. According to petitioners, the statute indicates that when U.S. law and the provisions of the Uruguay Round Agreements conflict, U.S. law prevails. See 19 U.S.C. § 3512(a)(1). Petitioner also cites the Statement of Administrative Action, which states "reports issued by panels or the Appellate Body under the DSU (Dispute Settlement Understanding) have no binding effect under U.S. law" and they "do not provide legal authority for federal agencies to change their regulations or procedures." SAA at 1032.

Department's Position: We disagree with Corus Staal and have not changed our calculation of the weighted-average dumping margin for the final determination. First, we note that Corus Staal's characterization of the methodology at issue as one that 'ignores' non-dumped sales and considers only dumped sales in determining the dumping rate is inaccurate. As further discussed below, non-dumped sales are included in the weighted-average margin calculation as just that—sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow non-dumped sales to cancel out dumping found on other sales.

This methodology is required by U.S. law. Section 771(35)(A) of the Tariff Act defines "dumping margin" as "the amount by which the normal value exceeds the export

price or constructed export price of the subject merchandise." Section 771(35)(B) defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." These sections, taken together, direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) makes clear that the singular "dumping margin" in section 771(35)(A) applies on a comparison-specific level, and does not itself apply on an aggregate basis. At no stage in this process is the amount by which export price or constructed export price exceeds normal value on non-dumped sales permitted to cancel out the dumping margins found on other sales.

This does not mean, however, that non-dumped sales are ignored in calculating the weighted-average rate. It is important to note that the weighted-average margin will reflect any 'non-dumped' merchandise examined during the investigation: the value of such sales is included in the denominator of the dumping rate, while no dumping amount for 'non-dumped' merchandise is included in the numerator. Thus, a greater amount of 'non-dumped' merchandise results in a lower weighted-average margin.

This is, furthermore, a reasonable means of establishing duty deposits in investigations, and assessing duties in reviews. In an investigation such as the present case, the deposit rate calculated must reflect that fact that the Customs Service is not in a position to know which entries of merchandise entered after the imposition of a dumping order are dumped and which are not. By spreading the estimated liability for dumped sales across all investigated sales, the

weighted-average dumping margin allows the Customs Service to apply this rate to all merchandise entered after an order goes into effect.

These statutory requirements take precedence over any potentially conflicting obligations under the Uruguay Round Agreements. The Uruguay Round Agreements Act makes clear that if there is a conflict between U.S. law and any provision of the WTO Uruguay Round Agreements, U.S. law prevails. See section 102(a)(1) of the URAA ("no provision of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States shall have effect.") Moreover, the SAA specifically provides that "[r]eports issued by panels or the Appellate Body under the DSU (i.e., the WTO Dispute Settlement Understanding) have no binding effect under the law of the United States." SAA at 1032, reprinted in 1994 U.S.C.C.A.N. 4040, 4318. Finally, the Bed Linens Panel and Appellate Body decisions concerned a dispute between the European Union and India. We have no WTO obligation to act based on these decisions.

* * * *

APPENDIX H

STATUTORY PROVISIONS

19 U.S.C. § 1516a. Judicial review in countervailing duty and antidumping duty proceedings

* * * *

(g) Review of countervailing duty and antidumping duty determinations involving free trade area country merchandise

(1) Definition of determination

For purposes of this subsection, the term "determination" means a determination described in—

(A) paragraph (1)(B) of subsection (a) of this section, or

(B) clause (i), (ii), (iii), or (vi) of paragraph (2)(B) of subsection (a) of this section,

if made in connection with a proceeding regarding a class or kind of free trade area country merchandise, as determined by the administering authority.

(2) Exclusive review of determination by binational panels

If binational panel review of a determination is requested pursuant to article 1904 of the NAFTA or of the Agreement, then, except as provided in paragraphs (3) and (4)—

(A) the determination is not reviewable under subsection (a) of this section, and

(B) no court of the United States has power or jurisdiction to review the determination on any question of law or fact by an action in the nature of mandamus or otherwise.

(3) Exception to exclusive binational panel review

(A) In general

A determination is reviewable under subsection (a) of this section if the determination sought to be reviewed is—

(i) a determination as to which neither the United States nor the relevant FTA country requested review by a binational panel pursuant to article 1904 of the NAFTA or of the Agreement,

(ii) a revised determination issued as a direct result of judicial review, commenced pursuant to subsection (a) of this section, if neither the United States nor the relevant FTA country requested review of the original determination,

(iii) a determination issued as a direct result of judicial review that was commenced pursuant to subsection (a) of this section prior to the entry into force of the NAFTA or of the Agreement,

(iv) a determination which a binational panel has determined is not reviewable by the binational panel,

(v) a determination as to which binational panel review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA, or

(vi) a determination as to which extraordinary challenge committee review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA.

(B) Special rule

A determination described in subparagraph (A)(i) or (iv) is reviewable under subsection (a) of this section only if the party seeking to commence review has provided timely notice of its intent to commence such review to—

(i) the United States Secretary and the relevant FTA Secretary;

(ii) all interested parties who were parties to the proceeding in connection with which the matter arises; and

(iii) the administering authority or the Commission, as appropriate.

Such notice is timely provided if the notice is delivered no later than the date that is 20 days after the date described in subparagraph (A) or (B) of subsection (a)(5) of this section that is applicable to such determination, except that, if the time for requesting binational panel review is suspended under paragraph (8)(A)(ii) of this subsection, any unexpired time for providing notice of intent to commence judicial review shall, during the pendency of any such suspension, also be suspended. Such notice shall contain such information, and be in such form, manner, and style, as the administering authority, in consultation with the Commission, shall prescribe by regulations.

(4) Exception to exclusive binational panel review for constitutional issues

(A) Constitutionality of binational panel review system

An action for declaratory judgment or injunctive relief, or both, regarding a determination on the grounds that any provision of, or amendment made by, the North American Free Trade Agreement Implementation Act implementing the binational dispute settlement system under chapter 19 of the NAFTA, or the United States-Canada Free-Trade Agreement Implementation Act of 1988 implementing the binational panel dispute settlement system under chapter 19 of the Agreement, violates the Constitution may be brought only in the United States Court of Appeals for the District of Columbia Circuit, which shall have jurisdiction of such action.

(B) Other constitutional review

Review is available under subsection (a) of this section with respect to a determination solely concerning a constitutional issue (other than an issue to which subparagraph (A) applies) arising under any law of the United States as enacted or applied. An action for review under this subparagraph shall be assigned to a 3-judge panel of the United States Court of International Trade.

(C) Commencement of review

Notwithstanding the time limits in subsection (a) of this section, within 30 days after the date of publication in the Federal Register of notice that binational panel review has been completed, an interested party who is a party to the proceeding in connection with which the matter arises may commence an action under subparagraph (A) or (B) by filing an action in accordance with the rules of the court.

(D) Transfer of actions to appropriate court

Whenever an action is filed in a court under subparagraph (A) or (B) and that court finds that the action should have been filed in the other court, the court in which the action was filed shall transfer the action to the other court and the action shall proceed as if it had been filed in the court to which it is transferred on the date upon which it was actually filed in the court from which it is transferred.

(E) Frivolous claims

Frivolous claims brought under subparagraph (A) or (B) are subject to dismissal and sanctions as provided under section 1927 of Title 28 and the Federal Rules of Civil Procedure.

(F) Security

(i) Subparagraph (A) actions

The security requirements of rule 65(c) of the Federal Rules of Civil Procedure apply with respect to actions commenced under subparagraph (A).

(ii) Subparagraph (B) actions

No claim shall be heard, and no temporary restraining order or temporary or permanent injunction shall be issued, under an action commenced under subparagraph (B), unless the party seeking review first files an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense parties affected for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction. If a court upholds the constitutionality of the determination in question in such action, the court shall award to a prevailing party fees and expenses, in addition to any costs incurred by that party, unless the court finds that the position of the other party was substantially justified or that special circumstances make an award unjust.

(G) Panel record

The record of proceedings before the binational panel shall not be considered part of the record for review pursuant to subparagraph (A) or (B).

(H) Appeal to Supreme Court of court orders issued in subparagraph (A) actions

Notwithstanding any other provision of law, any final judgment of the United States Court of Appeals for the District of Columbia Circuit which is issued pursuant to an action brought under subparagraph (A) shall be reviewable by appeal directly to the Supreme Court of the

United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under subparagraph (A) may be issued by a single Justice of the Supreme Court.

(5) Liquidation of entries

(A) Application

In the case of a determination for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, the rules provided in this paragraph shall apply, notwithstanding the provisions of subsection (c) of this section.

(B) General rule

In the case of a determination for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, entries of merchandise covered by such determination shall be liquidated in accordance with the determination of the administering authority or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the administering authority of notice of a final decision of a binational panel, or of an extraordinary challenge committee, not in harmony with that determination. Such notice of a decision shall be published within 10 days of the date of the issuance of the panel or committee decision.

(C) Suspension of liquidation

(i) In general

Notwithstanding the provisions of subparagraph (B), in the case of a determination described in clause (iii) or (vi) of subsection (a)(2)(B) of this

section for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, the administering authority, upon request of an interested party who was a party to the proceeding in connection with which the matter arises and who is a participant in the binational panel review, shall order the continued suspension of liquidation of those entries of merchandise covered by the determination that are involved in the review pending the final disposition of the review.

(ii) Notice

At the same time as the interested party makes its request to the administering authority under clause (i), that party shall serve a copy of its request on the United States Secretary, the relevant FTA Secretary, and all interested parties who were parties to the proceeding in connection with which the matter arises.

(iii) Application of suspension

If the interested party requesting continued suspension of liquidation under clause (i) is a foreign manufacturer, producer, or exporter, or a United States importer, the continued suspension of liquidation shall apply only to entries of merchandise manufactured, produced, exported, or imported by that particular manufacturer, producer, exporter, or importer. If the interested party requesting the continued suspension of liquidation under clause (i) is an interested party described in subparagraph (C), (D), (E), or (F) of section 1677(9) of this title, the continued suspension of liquidation shall apply only to entries which could be affected by a decision of the binational panel convened under chapter 19 of the NAFTA or of the Agreement.

(iv) Judicial review

Any action taken by the administering authority or the United States Customs Service under this subparagraph shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise.

(6) Injunctive relief

Except for cases under paragraph (4)(B), in the case of a determination for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, the provisions of subsection (c)(2) of this section shall not apply.

(7) Implementation of international obligations under article 1904 of the NAFTA or the Agreement

(A) Action upon remand

If a determination is referred to a binational panel or extraordinary challenge committee under the NAFTA or the Agreement and the panel or committee makes a decision remanding the determination to the administering authority or the Commission, the administering authority or the Commission shall, within the period specified by the panel or committee, take action not inconsistent with the decision of the panel or committee. Any action taken by the administering authority or the Commission under this paragraph shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise.

(B) Application if subparagraph (A) held unconstitutional

In the event that the provisions of subparagraph (A) are held unconstitutional under the provisions of subparagraphs (A) and (H) of paragraph (4), the provisions of this subparagraph shall take effect. In such event, the President is authorized on behalf of the United States to accept, as a whole, the decision of a binational panel or extraordinary challenge committee remanding the determination to the administering authority or the Commission within the period specified by the panel or committee. Upon acceptance by the President of such a decision, the administering authority or the Commission shall, within the period specified by the panel or committee, take action not inconsistent with such decision. Any action taken by the President, the administering authority, or the Commission under this subparagraph shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise.

(8) Requests for binational panel review

(A) Interested party requests for binational panel review

(i) General rule

An interested party who was a party to the proceeding in which a determination is made may request binational panel review of such determination by filing a request with the United States Secretary by no later than the date that is 30 days after the date described in subparagraph (A), (B), or (E) of subsection (a)(5) of this section that is applicable to such determination. Receipt of such request by the United States Secretary shall be deemed to be a request for binational panel review

within the meaning of article 1904(4) of the NAFTA or of the Agreement. Such request shall contain such information and be in such form, manner, and style as the administering authority, in consultation with the Commission, shall prescribe by regulations.

(ii) Suspension of time to request binational panel review under the NAFTA

Notwithstanding clause (i), the time for requesting binational panel review shall be suspended during the pendency of any stay of binational panel review that is issued pursuant to paragraph 11(a) of article 1905 of the NAFTA.

(B) Service of request for binational panel review

(i) Service by interested party

If a request for binational panel review of a determination is filed under subparagraph (A), the party making the request shall serve a copy, by mail or personal service, on any other interested party who was a party to the proceeding in connection with which the matter arises, and on the administering authority or the Commission, as appropriate.

(ii) Service by United States Secretary

If an interested party to the proceeding requests binational panel review of a determination by filing a request with the relevant FTA Secretary, the United States Secretary shall serve a copy of the request by mail on any other interested party who was a party to the proceeding in connection with which the matter arises, and on the administering authority or the Commission, as appropriate.

(C) Limitation on request for binational panel review

Absent a request by an interested party under subparagraph (A), the United States may not request binational panel review of a determination under article 1904 of the NAFTA or the Agreement.

(9) Representation in panel proceedings

In the case of binational panel proceedings convened under chapter 19 of the NAFTA or of the Agreement, the administering authority and the Commission shall be represented by attorneys who are employees of the administering authority or the Commission, respectively. Interested parties who were parties to the proceeding in connection with which the matter arises shall have the right to appear and be represented by counsel before the binational panel.

(10) Notification of class or kind rulings

In the case of a determination which is described in paragraph (2)(B)(vi) of subsection (a) of this section and which is subject to the provisions of paragraph (2), the administering authority, upon request, shall inform any interested person of the date on which the Government of the relevant FTA country received notice of the determination under paragraph 4 of article 1904 of the NAFTA or the Agreement.

(11) Suspension and termination of suspension of article 1904 of the NAFTA

(A) Suspension of article 1904

If a special committee established under article 1905 of the NAFTA issues an affirmative finding, the Trade Representative may, in accordance with paragraph 8(a) or 9, as appropriate, of article 1905 of the NAFTA, suspend the operation of article 1904 of the NAFTA.

(B) Termination of suspension of article 1904

If a special committee is reconvened and makes an affirmative determination described in paragraph 10(b) of article 1905 of the NAFTA, any suspension of the operation of article 1904 of the NAFTA shall terminate.

(12) Judicial review upon termination of binational panel or committee review under the NAFTA

(A) Notice of suspension or termination of suspension of article 1904

(i) Upon notification by the Trade Representative or the Government of a country described in subsection (f)(10)(A) or (B) of this section that the operation of article 1904 of the NAFTA has been suspended in accordance with paragraph 8(a) or 9 of article 1905 of the NAFTA, the United States Secretary shall publish in the Federal Register a notice of suspension of article 1904 of the NAFTA.

(ii) Upon notification by the Trade Representative or the Government of a country described in subsection (f)(10)(A) or (B) of this section that the suspension of the operation of article 1904 of the NAFTA is terminated in accordance with paragraph 10 of article 1905 of the NAFTA, the United States Secretary shall publish in the Federal Register a notice of termination of suspension of article 1904 of the NAFTA.

(B) Transfer of final determinations for judicial review upon suspension of article 1904

If the operation of article 1904 of the NAFTA is suspended in accordance with paragraph 8(a) or 9 of article 1905 of the NAFTA—

(i) upon the request of an authorized person described in subparagraph (C), any final

determination that is the subject of a binational panel review or an extraordinary challenge committee review shall be transferred to the United States Court of International Trade (in accordance with rules issued by the Court) for review under subsection (a) of this section; or

(ii) in a case in which—

(I) a binational panel review was completed fewer than 30 days before the suspension, and

(II) extraordinary challenge committee review has not been requested,

upon the request of an authorized person described in subparagraph (C) which is made within 60 days after the completion of the binational panel review, the final determination that was the subject of the binational panel review shall be transferred to the United States Court of International Trade (in accordance with rules issued by the Court) for review under subsection (a) of this section.

(C) Persons authorized to request transfer of final determinations for judicial review

A request that a final determination be transferred to the Court of International Trade under subparagraph (B) may be made by—

(i) if the United States made an allegation under paragraph 1 of article 1905 of the NAFTA and the operation of article 1904 of the NAFTA was suspended pursuant to paragraph 8(a) of article 1905 of the NAFTA—

(I) the government of the relevant country described in subsection (f)(10)(A) or (B) of this section,

(II) an interested party that was a party to the panel or committee review, or

(III) an interested party that was a party to the proceeding in connection with which panel review was requested, but only if the time period for filing notices of appearance in the panel review has not expired, or

(ii) if a country described in subsection (f)(10)(A) or (B) of this section made an allegation under paragraph 1 of article 1905 of the NAFTA and the operation of article 1904 of the NAFTA was suspended pursuant to paragraph 9 of article 1905 of the NAFTA—

(I) the government of that country,

(II) an interested party that is a person of that country and that was a party to the panel or committee review, or

(III) an interested party that is a person of that country and that was a party to the proceeding in connection with which panel review was requested, but only if the time period for filing notices of appearance in the panel review has not expired.

(D) Transfer for judicial review upon settlement

(i) If the Trade Representative achieves a settlement with the government of a country described in subsection (f)(10)(A) or (B) of this section pursuant to paragraph 7 of article 1905 of the NAFTA, and referral for judicial review is among the terms of such settlement, any final determination that is the subject of a binational panel review or an extraordinary challenge committee review shall, upon a request described in clause (ii), be transferred to the United States Court of International Trade (in

accordance with rules issued by the Court) for review under subsection (a) of this section.

(ii) A request referred to in clause (i) is a request made by—

(I) the country referred to in clause (i),

(II) an interested party that was a party to the panel or committee review, or

(III) an interested party that was a party to the proceeding in connection with which panel review was requested, but only if the time for filing notices of appearance in the panel review has not expired.

19 U.S.C. § 1673. Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

* * * *

19 U.S.C. § 1677. Definitions; special rules

For purposes of this subtitle—

(1) Administering authority. The term "administering authority" means the Secretary of Commerce, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law.

* * * *

(34) Dumped; dumping. The terms "dumped" and "dumping" refer to the sale or likely sale of goods at less than fair value.

(35) Dumping margin; weighted average dumping margin

(A) Dumping margin. The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin. The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

* * * *

19 U.S.C. § 1677b. Normal value

(a) Determination. In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:

(1) Determination of normal value.

(A) In general. The normal value of the subject merchandise shall be the price described in subparagraph (B), at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price under section 1677a(a) or (b) of this title.

(B) Price. The price referred to in subparagraph (A) is—

(i) the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price, or

(ii) in a case to which subparagraph (C) applies, the price at which the foreign like product is so sold (or offered for sale) for consumption in a country other than the exporting country or the United States, if—

(I) such price is representative,

(II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in

such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States, and

(III) the administering authority does not determine that the particular market situation in such other country prevents a proper comparison with the export price or constructed export price.

(C) Third country sales. This subparagraph applies when—

(i) the foreign like product is not sold (or offered for sale) for consumption in the exporting country as described in subparagraph (B)(i),

(ii) the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States, or

(iii) the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.

For purposes of clause (ii), the aggregate quantity (or value) of the foreign like product sold in the exporting country shall normally be considered to be insufficient if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

(2) Fictitious markets. No pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account in determining normal value. The occurrence of different movements in the prices at which different forms of the

foreign like product are sold (or, in the absence of sales, offered for sale) in the exporting country after the issuance of an antidumping duty order may be considered by the administering authority as evidence of the establishment of a fictitious market for the foreign like product if the movement in such prices appears to reduce the amount by which the normal value exceeds the export price (or the constructed export price) of the subject merchandise.

(3) Exportation from an intermediate country. Where the subject merchandise is exported to the United States from an intermediate country, normal value shall be determined in the intermediate country, except that normal value may be determined in the country of origin of the subject merchandise if—

(A) the producer knew at the time of the sale that the subject merchandise was destined for exportation;

(B) the subject merchandise is merely transshipped through the intermediate country;

(C) sales of the foreign like product in the intermediate country do not satisfy the conditions of paragraph (1)(C); or

(D) the foreign like product is not produced in the intermediate country.

(4) Use of constructed value. If the administering authority determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(i), then, notwithstanding paragraph (1)(B)(ii), the normal value of the subject merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

(5) Indirect sales or offers for sale. If the foreign like product is sold or, in the absence of sales, offered for sale through an affiliated party, the prices at which the foreign

like product is sold (or offered for sale) by such affiliated party may be used in determining normal value.

(6) Adjustments. The price described in paragraph (1)(B) shall be—

(A) increased by the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States;

(B) reduced by—

(i) when included in the price described in paragraph (1)(B), the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser,

(ii) the amount, if any, included in the price described in paragraph (1)(B), attributable to any additional costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser, and

(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product, and

(C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section)

that is established to the satisfaction of the administering authority to be wholly or partly due to—

(i) the fact that the quantities in which the subject merchandise is sold or agreed to be sold to the United States are greater than or less than the quantities in which the foreign like product is sold, agreed to be sold, or offered for sale,

(ii) the fact that merchandise described in subparagraph (B) or (C) of section 1677(16) of this title is used in determining normal value, or

(iii) other differences in the circumstances of sale.

(7) Additional adjustments.

(A) Level of trade. The price described in paragraph (1)(B) shall also be increased or decreased to make due allowance for any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise made under this section) that is shown to be wholly or partly due to a difference in level of trade between the export price or constructed export price and normal value, if the difference in level of trade—

(i) involves the performance of different selling activities; and

(ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.

In a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.

(B) Constructed export price offset. When normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine under subparagraph (A)(ii) a level of trade adjustment, normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 1766a(d)(1)(D) of this title.

(8) Adjustments to constructed value. Constructed value as determined under subsection (e) of this section, may be adjusted, as appropriate, pursuant to this subsection.

* * * *

19 U.S.C. § 3533. Dispute settlement panels and procedures

* * * *

(g) Requirements for agency action

(1) Changes in agency regulations or practice

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f) of this section;

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

(2) Effective date of modification

A final rule or other modification to which paragraph (1) applies may not go into effect before the end of the 60-day period beginning on the date on which consultations under paragraph (1)(E) begin, unless the President determines that an earlier effective date is in the national interest.

(3) Vote by congressional committees

During the 60-day period described in paragraph (2), the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate may vote to indicate the agreement or disagreement of the committee with the proposed contents of the final rule or other modification. Any such vote shall not be binding on the department or agency which is implementing the rule or other modification.

(4) Inapplicability to ITC

This subsection does not apply to any regulation or practice of the International Trade Commission.

* * * *

19 U.S.C. § 3538. Administrative action following WTO panel reports

* * * *

(b) Action by administering authority

(1) Consultations with administering authority and congressional committees

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) Determination by administering authority

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C.A. § 1202 et seq.], the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees

under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C.A. § 1677]) that are entered, or withdrawn from warehouse, for consumption on or after—

* * * *

(B) in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

* * * *

APPENDIX I

ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

Secretariat File No. USA-CDA-2002-1904-02

IN THE MATTER OF
CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA:
FINAL AFFIRMATIVE ANTIDUMPING DETERMINATION

DECISION OF THE PANEL FOLLOWING REMAND

June 9, 2005

Panelists: Jeffery Atik, Ivan R. Feltham, W. Roy Hines, John M. Peterson (Chairman), Leon Trakman[1]

Appearances:

Weil, Gotshal & Manges, LLP (M. Jean Anderson) for the Government of Canada

United States Department of Commerce (Anne Talbot, Mark Barnett) for the United States Department of Commerce International Trade Administration

Gibson, Dunn & Crutcher, LLP (Gracia Berg) for West Fraser Mills Ltd.

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[1] The panelists wish to express their appreciation for the excellent support received from Panelist Assistants Jacqueline Weisman, Esq. and Ramnarayan Aiyer.

Baker & Hostetler, LLP (Elliot J. Feldman) for Ontario Forest Industries Association, Ontario Lumber Manufacturers Association and Tembec Inc.

Dewey Ballantine, LLP (Harry Clark, Bradford Ward) for the Coalition for Fair Lumber Imports Executive Committee

INTRODUCTION

On March 5, 2004, the Panel remanded this case to the United States Department of Commerce, International Trade Administration ("Commerce"), directing the agency to recalculate the final less than fair value (LTFV) margin for respondent West Fraser Mills Ltd. ("West Fraser"). Commerce's response to that remand decision raised significant issues concerning the authority of the Panel and the reach of its decisions. To address these issues, the Panel sought supplemental briefing from the parties and conducted additional oral arguments.

In addition, certain Complainants sought reconsideration of the Panel's decision regarding the Commerce Department's use of "zeroing"—that is, of recognizing only positive margins of dumping (less than fair value sales), and assigning nondumped sales a margin of zero when determining weighted average LTFV margins. While the Panel was conducting its reconsideration, a Panel of the World Trade Organization's Dispute Settlement Body ("DSB"), considering the same final LTFV determination which is the subject of this proceeding, ruled that Commerce's practice of "zeroing" violates the requirements of the WTO Antidumping Agreement ("ADA"). The DSB Panel's decision was affirmed by the WTO Appellate Body August 11, 2004, and the Panel and Appellate Body reports were adopted by the DSB August 31, 2004.

Upon consideration of the arguments of the Parties, the Panel has determined that this case must be remanded to Commerce, with instructions (1) to revoke the antidumping

duty order on *Softwood Lumber from Canada* with respect to exports by West Fraser Mills, and (2) recalculate the final LTFV margins for all other respondents without "zeroing".

* * * *

2. *Commerce's Use of "Zeroing" in Calculating the Final LTFV Margins Was Contrary to Law*

Complainants argue once again that the Department's act of zeroing negative-margin transactions in this investigation is contrary to law. In our prior decisions, we determined zeroing to be a permissible application of the statute. Panel Decision of July 17, 2003 at 56-61; Panel Decision of March 5, 2004 at 33-34; Panel Decision of July 21, 2004.

In our prior decisions, we had not been prepared to find zeroing to be inconsistent with the Antidumping Agreement. We did however signal the possibility that our view might well change were the WTO's Dispute Settlement Body (DSB) to establish that zeroing violates the Antidumping Agreement. We had been aware that Canada had brought a challenge to the Department's use of zeroing before the DSB under the WTO Dispute Settlement Understanding and that the DSB would likely address the compatibility of zeroing with the United States' WTO Antidumping Agreement obligations.

In our July 17, 2003 decision, we noted:

> A clear finding of inconsistency of the Department's practice of zeroing with the United States' WTO Antidumping Agreement obligations would, however, implicate the *Charming Betsy* doctrine. *Charming Betsy* is a federal common law principle of statutory interpretation. In the case of statutory ambiguity, *Charming Betsy* requires the rejection of an otherwise permissible interpretation if that interpretation conflicts with an international treaty obligation of the United States. Were the Department's practice of zeroing ... found to be inconsistent with the WTO Antidumping Agreement,

> application of the *Charming Betsy* doctrine might well constrain this panel to find the Department's practice unreasonable and therefore contrary to law [citations omitted].

The DSB has adopted the report of the Appellate Body in *United States – Final Dumping Determination on Softwood Lumber from Canada*, ¶ 183(a), WT/DS264/AB/R (Aug. 11, 2004) [hereinafter, "the WTO *Softwood Lumber* Decision"], finding that the application of zeroing in this investigation indeed does violate the United States' obligations under the Antidumping Agreement. This development then motivates our reassessment of the zeroing issue.

A. *Appropriateness of Reconsideration*

Complainants raised the zeroing issue for our reconsideration on August 2, 2004, under a styled "Notice of Joint Motion For Re-examination of the Panel's July 21, 2004 Decision." This Notice of Motion purported to bring to the attention of the Panel the imminent adoption by the WTO Dispute Settlement Body of the report of the Appellate Body in the WTO *Softwood Lumber* Decision.

Commerce and the Coalition objected to this Notice of Motion on the grounds that it did not comply with Rule 76. *See* Response of the United States Department of Commerce to Notice of Joint Motion For Re-examination of the Panel's July 21, 2004 Decision (Aug. 10, 2004) and Response of the Coalition for Fair Lumber Imports Executive Committee to the Notice of Joint Motion For Re-examination of the Panel's July 21, 2004 Decision (Aug. 12, 2004).

Rule 76 provides for participant-initiated requests for re-examination by the Panel of its decision "for the purpose of correcting an accidental oversight, inaccuracy or omission." In its response, Commerce contends that the adoption of the WTO *Softwood Lumber* Decision subsequent to this Panel's decision of July 21, 2004 does not constitute an instance of "accidental oversight, inaccuracy or omission" with respect to

the zeroing question and as such the Notice of Motion should have been rejected.

This Panel did not reject the Notice of Motion. Rather, the Panel scheduled oral argument by the participants for purposes of ascertaining the effect, if any, of the adoption of the WTO *Softwood Lumber* Decision. Even had the Panel ruled the Notice of Motion out-of-order (accepting arguendo Commerce's contention that the Motion did not raise an "accidental oversight, inaccuracy or omission"), the Panel could properly consider *sua sponte* under Rule 2 the effect of the adoption of the WTO *Softwood Lumber* Decision on its ultimate definitive ruling.

Rule 2 creates a residual ability for each panel established under Chapter 19 to determine appropriate procedures. Even were Rule 76 to be read to limit this Panel's reconsideration of the zeroing issue upon a party's motion, the Panel remains able to hold further oral argument, accept written submissions and reconsider its prior decision under this authority. Rule 2 provides (in part):

> Where a procedural question arises that is not covered by these rules, a panel may adopt the procedure to be followed in the particular case before it by analogy to these rules or may refer for guidance to rules of procedure of a court that would otherwise have had jurisdiction in the importing country.

We have not issued a Notice of Final Panel Action in this matter. We note that NAFTA rules do not expressly provide for reconsideration in the instance of the issuance of relevant (and perhaps controlling) subsequent authority during the pendency of panel review. Rule 2 permits a panel to engage in appropriate reconsideration in this instance. The Court of International Trade would have been able to accept further written submissions and hold oral arguments in an analogous situation. See, e.g., *Borlem S.A.-Empreedimentos Industrias v. United States*, 913 F.2d 933, 939 (Fed. Cir. 1990)

[reviewing Court has discretion to remand case to agency for reconsideration when intervening events make remand appropriate].

Further, NAFTA Article 1904(2) charges this Panel "to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party." Disregarding consideration of the effect of the supervening adoption of the WTO *Softwood Lumber* Decision would cause this Panel to fail its mandate. Our overriding purpose is to review the Department's action according to the antidumping law of the United States as we see it—our prior decisions notwithstanding.

We note Commerce and the Coalition did participate in written submissions and oral argument. Their positions and arguments are fully considered herein.

B. *On the Lawfulness of Zeroing in this Investigation*

Our prior holdings are consistent with the determination of the Court of Appeals for the Federal Circuit in *Timken* and *Corus Staal,* which also deal with challenges to the Department's zeroing negative-margin transactions. *Timken Company v. United States,* 354 F.3d 1334 (Fed. Cir. 2004), *cert. den. sub nom. Koyo Seiko Co. v. United States,* 2004 U.S. LEXIS 7382 (2004); see also *Corus Staal B.V. v. United States,* 395 F.3d 1345 (Fed. Cir. 2005).

In *Timken,* the CAFC followed "the familiar two-part inquiry to determine whether to sustain an agency's interpretation of the statutory scheme it is charged with administering" (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc,* 467 U.S. 837, 842-43 (1984)). First, the CAFC found that the statute "does not unambiguously require that dumping margins be positive numbers," notwithstanding the dictionary definition of the term "exceeds." *Timken,* 354

F.3d at 1342 (construing the term "exceeds" in 19 U.S.C. §1677(35)(A)).[18]

Having determined that the statute is ambiguous, the CAFC then reviewed the Department's use of zeroing under *Chevron* and found it to be a permissible construction of the statute ("[W]hile the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction."). *Id.*

However, *Chevron is* not the only test a court or panel applies in reviewing a challenged agency interpretation of an ambiguous statute. The *Charming Betsy* doctrine requires courts to interpret U.S. law, whenever possible, in a manner consistent with the international legal obligations of the United States. *The Charming Betsy*, 6 U.S. (Cranch) 64, 118 (1804). An otherwise permissible agency interpretation (i.e. one that passes *Chevron*) which conflicts with a U.S. international obligation is, absent a clear legislative command, contrary to law. See *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 US 568, 574-75, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988).

C. *On the Preclusive Effect of the URAA*

While the Panel was considering its decision in this action, the CAFC issued its opinion in *Corus Staal B.V. v. United States*, 395 F.3d 1343 (Fed. Cir. 2005), in which that court considered the legality of Commerce's practice of "zeroing" in light of, *inter alia*, the WTO *Softwood Lumber* Decision. The CAFC determined that "[b]ecause zeroing is in fact permissible in administrative investigations and because Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law", it would not disturb the

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[18] The Department has accepted that zeroing is not mandated by statute. See the arguments presented by the United States before the WTO in *Executive Summary of the First Written Submission of the United States dated February 10, 2005* in *United States — Laws, Regulations and Methodologies for Calculating Dumping Margins (Zeroing)*, WT/DS294.

agency's use of zeroing in a final LTFV determination. Acknowledging various WTO decisions which held the practice of zeroing to be inconsistent with the WTO Antidumping Agreement, the *Corus* court ruled that WTO decisions are "not binding on the United States much less this court," citing *Timken*, 354 F.3d at 1344.

This statement of the CAFC is unexceptional, as none of the Uruguay Round Agreements (including the Antidumping Agreement and the Dispute Settlement Understanding) are self-executing. Decisions of the WTO Dispute Settlement Body do not directly affect the internal law of the United States. This Panel clearly lacks the power to directly implement the *WTO Softwood Lumber* Decision or any other decision of the DSB. The Uruguay Round Agreements Act ("URAA") indeed provides that no person:

> may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with [a WTO] agreement. 19 U.S.C. §3512(c)(1)(b).

But the question before this Panel concerns the scope and applicability of the *Charming Betsy* doctrine, which is a canon of U.S. law. While Section 3512(c)(1)(b) does deprive a "person" from directly pleading the inconsistency of a U.S. "action or inaction" with a WTO obligation in a U.S. court, it does not strip away from a court (or from a binational panel) the ability—indeed the responsibility—to consider WTO obligations in assessing the legality of agency action under *Charming Betsy*. See *Timken*, 354 F.3d at 1343-33. U.S. agencies are bound to interpret statutes consistently with U.S. international obligations.

One of the predicates for the invocation of the *Charming Betsy* doctrine is that U.S. agency action be in conflict with an international legal obligation of the United States. The

relevant international legal obligation in this matter is the obligation of the United States under the Antidumping Agreement to make "fair comparisons" in determining dumping margins. This obligation is sourced in a treaty, and not in any decision of the DSB, and exists before, during, and after completion of the dispute settlement process in the WTO *Softwood Lumber* Decision.[19] The WTO *Softwood Lumber* Decision does not itself cause the challenged United States measure (zeroing) to be in conflict with the Antidumping Agreement or any other international legal obligation of the United States for purposes of *Charming Betsy*. Rather, it establishes with considerable authority that the measure is so in conflict, which makes application of *Charming Betsy* more assuredly correct.

The *Corus Staal* court did not dispose of the *Charming Betsy* issue occasioned by the WTO *Softwood Lumber* Decision, which issue had been argued before it. The CAFC did not reach the *Charming Betsy* arguments present in *Corus Staal* because of the preclusive effect it found in various features of the URAA, most particularly Section 123 and Section 129 (19 U.S.C. §3533; §3538, hereafter "Section 123" and "Section 129"). The *Corus Staal* court noted that "The conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government . . . ." 395 F.3d at 1349, citing *United States v. Pink*, 315 U.S. 203, 222-23 (1942). Moreover, those political branches of government have agreed upon, and Congress has enacted, specific statutory procedures for determining whether the United States will implement WTO DSB decisions. The *Corus Staal* court declined to apply the WTO Softwood *Lumber* Decision "because the finding therein was

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[19] See 70 Fed. Reg. 22636 (May 2, 2005) [noting the United States' acceptance of the WTO DSB decision in *Softwood Lumber from Canada*]. Canada's Government has challenged this implementation before the WTO.

not adopted as per Congress's statutory scheme". 395 F.3d at 1349.

The CAFC cites various provisions of the URAA to explain its non-disturbance of Commerce's use of zeroing in *Corus Staal,* notwithstanding the finding of the DSB in the WTO *Softwood Lumber* Decision that zeroing was inconsistent with the United States' WTO obligations. The court begins with a reference to 19 U.S.C. §3512(a):

> Further, "[no] provision of any of the Uruguay Round Agreements [e.g., the ADA] nor the application of any such provisions to any person or circumstance, that is inconsistent with any law of the United States, shall have effect." 19 U.S.C. §3512(a) (2000). Neither the GATT nor any enabling international agreement outlining compliance therewith (e.g., the ADA) trumps domestic legislation: if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress.

395 F.3d at 1348.

The challenge here, however, as was the case in *Corus Staal*, does not involve the application of any "law of the United States." Section 3512(a) deals with statutes, and as such is not directly relevant to this proceeding. As the CAFC itself has held in *Timken,* zeroing is not mandated by any U.S. statute. Zeroing is a discretionary agency determination which must be consistent with United States international legal obligations in order to be lawful as a matter of United States law, unless there is a statutory override of those obligations.

The Federal Circuit found such an override in the provisions of Section 123 and Section 129. The Federal Circuit in *Corus* noted that:

> Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representation, an arm of the Executive Branch, in

> consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so, implemented, the extent of implementation. See [Sections 123(f), 129] (2000); see also [Section 123(g)] (defining a statutory scheme that Commerce must observe in order to change its policy to conform to a WTO ruling).

395 F.3d at 1349. *Corus Staal* holds that the exclusive process for determining the U.S. response to an adverse determination by the WTO DSB is through the consultation and implementation scheme anticipated by Sections 123 and 129 of the URAA. When U.S. response to an adverse DSB ruling is under consideration or contest, it would be an intrusion on the decisional authority that Sections 123 and 129 accord to the USTR (in consultation with relevant congressional committees) for a court or a NAFTA Chapter 19 binational panel to find an agency measure unlawful under *Charming Betsy*.

Thus, Section 123(f) (19 U.S.G. §3533(f)) provides that:

> (f) Actions upon circulation of reports
>
> Promptly after the circulation of a report of a panel or of the Appellate Body to WTO members in a proceeding described in subsection (d) of this section, the Trade Representative shall—
>
> (1) notify the appropriate congressional committees of the report;
>
> (2) in the case of a report of a panel, consult with the appropriate congressional committees concerning the nature of any appeal that may be taken of the report; and
>
> (3) if the report is adverse to the United States, consult with the appropriate congressional committees concerning whether to implement the report's

recommendation and, if so, the manner of such implementation and the period of time needed for such implementation.

Further procedures are specified in Section 129(b) and (c) (19 U.S.C. §3538(b) and (c)), which require that:

Sec. 3538. Administrative action following WTO panel reports

* * *

(b) Action by administering authority

(1) Consultations with administering authority and congressional committees

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.) is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(A) Determination by administering authority

Notwithstanding any provision of the Tariff Act of 1930 (19 U.S.C. 1202 et seq.), the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(1) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(2) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.) that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act (19 U.S.C. 1677)) that are entered, or withdrawn from warehouse, for consumption on or after—

* * *

(B) in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

(2) Notice of implementation

(A) The administering authority shall publish in the Federal Register notice of the imple-

> mentation of any determination made under this section with respect to title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.). implementation.

The preclusive effect of the statutory scheme established by Sections 123 and 129 is not, however, without limits. By their terms, Section 123 and 129 anticipate that the process ends, in the case of a decision to implement, with an implementation direction by USTR and by publication of a notice of implementation in the Federal Register.

In *Softwood Lumber,* the Section 123/Section 129 process has run its course. On November 5, 2004, the USTR requested "that the Department issue a determination that would render the Department's actions in the *[Softwood Lumber]* investigation not inconsistent with the findings of the DSB."[20] On January 31, 2005, the Department issued its Preliminary Section 129 Determination. Commerce received a joint brief from the Canadian parties on February 22, 2005 and a brief from the Coalition on March 7, 2005. On April 15, 2005, the Department issued its final Section 129 Determination. On April 19, 2005, the Department forwarded its Final Section 129 Determination to USTR. USTR held consultations with the appropriate congressional committees on April 25, 2005, and on April 27, 2005 the USTR directed Commerce to implement the. Final Section 129 Determination.[21] Notice of implementation appeared in the Federal Register on May 2, 2005. 70 Fed. Reg. 22636. Thus, the elaborate process provided by the URAA for responding to an adverse WTO DSB decision is complete.

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[20] Notice of Determination Under Section 129, 70 Fed. Reg. 22636 (May 2, 2005).

[21] The Final Section 129 Determination provides that "... the Department is precluded in this instance from not offsetting non-dumped sales in making weighted average-to-weighted average comparisons ..." 70 Fed. Reg 22636 at 22639.

The question then for this Panel is whether the preclusive effect of Sections 123 and 129 on judicial and panel review found in *Corus Staal* continues when the United States determines to implement an adverse DSB decision and the Section 123/Section 129 process is completed. *Corus Staal* does not address this point; the Section 123/Section 129 process was in course at the time of the *Corus Staal* decision. There is language in *Corus Staal*, however, that indicates that the preclusive effect of the URAA continues "unless and until such ruling has been adopted pursuant to the specified statutory scheme." 395 F.3d at 1349. The "unless and until" limitation found in *Corus Staal* (itself an echo of the "unless and until" limitation in Section 123(g)(1) with respect to unilateral abandonment of an inconsistent agency regulation or "practice" pending consultations) suggests that the preclusion created by the URAA may terminate.

It is thus a matter of first impression for this Panel to determine whether the statutory mechanism for responding to an adverse DSB decision has been completed, and its preclusive effect has terminated. In other words, we must determine whether the statutory scheme designed by Congress in the URAA continues to preclude review of zeroing when (1) the United States has acknowledged in its Section 129 Determination that its measure is inconsistent with its Antidumping Agreement obligations; (2) the United States has determined that the Department should render its actions in the relevant investigation to be not inconsistent with the findings of the DSB; and (3) the Section 129 process is complete.

D. *On the Non-Retroactivity of the Section 129 Determination*

The new rates established in the Department's Final Section 129 Determination unambiguously apply to "unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after April 27, 2005." The Final Section 129 Determination is not

before this Panel. But as the Final Section 129 Determination applies "on or after April 27, 2005," the LTFV Determination that is the subject of this review remains effective with respect to entries entered prior to April 27, 2005. This Panel will thus continue to review the original LTFV Determination under NAFTA Article 1904. The Final Section 129 Determination does not affect, and thus does not eliminate, the Department's use of zeroing in the original LTFV Determination.

We note (1) the use of the April 27, 2005 effective date for the Final Section 129 Determination and (2) the continuing effectiveness of the original LTFV determination jointly operate to make the United States' renunciation of zeroing in response to the decision of the DSB non-retroactive. We decline, however, to read into this non- retroactive outcome the presence of a deliberate Executive/Congressional decision under the Section 123/Section 129 design that would insulate the original LTFV determination from our review. In our view, such an inference would produce an outcome that was neither expressly intended by the executive nor reasonably inferred from these provisions in the instant case.

The WTO Dispute Resolution Understanding, as did prior GATT practice, requires only prospective relief in response to a finding of an inconsistent measure. In concert, Section 129(c) expressly provides that Section 129 determinations implementing a DSU decision are prospective only:

> (c) Effects of determinations; notice of implementation
>
> (1) Effects of determinations
>
> Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C. 1677]) that are entered, or withdrawn from warehouse, for consumption on or after

> (A) in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and
>
> (B) in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

USTR does not have the power, under Section 129(b)(4) or any other statute, to direct the Department to implement an adverse DSB decision retroactively. As the DSU does not require retroactive implementation, there are no WTO considerations that attach to the question of retroactive implementation. In response to the WTO *Softwood Lumber* Decision, the political branches have determined to bring the United States into compliance with the DSB's decision prospectively: this is all the DSU requires and is the only implementation that Section 129 contemplates.

The Statement of Administrative Action supports this reading of Section 129:

> [. . .] subsection 129(c)(1) provides that where determinations by . . . Commerce are implemented under subsection . . .(b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where depending on the circumstances of the case, retroactive relief may be available. SAA at 1026.

Further, we take note that the United States argued before the WTO, in *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* (WT/DS221/R), that while Section 129 provides for prospective effect in the event of implementation, it does not foreclose the possibility of retroactive effect of such implementation. In Paragraph 3.73, the United States states that it is "not aware of a scenario . . . in which Section 129(c)(1) would mandate WTO-inconsistent action [by foreclosing retrospective relief] or preclude the United States from acting in a WTO-consistent manner." Indeed, the United States cites the applicability of the *Charming Betsy* doctrine to prior determinations that continue in force in order to demonstrate that the non-retroactive character of Section 129(c)(1) does not foreclose the possibility that these prior determinations be brought into compliance with U.S. WTO obligations:

> 3.74 The meaning of section 129(c)(1) as a matter of US law is a factual question that must be answered by applying US principles of statutory construction. In this regard, US courts and agencies must recognize the longstanding and elementary principle of US statutory construction that an "act of Congress ought never to be construed to violate the law of nations if any other possible construction remains" [citation to *Charming Betsy*].
>
> *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* (WT/DS221 /R)

As the adoption of prospective implementation under Section 129 does not foreclose the reasonable applicability of retrospective relief, a determination by Commerce which continues in force following Section 129 implementation is, as the United States has argued before the WTO, subject to the *Charming Betsy* doctrine.

The analysis presented here might well have differed had USTR determined, after appropriate consultation, to *not* direct

implementation of the DSB's ruling (by paying compensation or accepting the imposition of sanctions). In this scenario, which differs from the circumstances before us, it may well be that the Section 123/Section 129 process would then continue to preclude resort to judicial review of the determination.

By its terms, Section 123(g) limits the ability of a U.S. agency to unilaterally amend or modify a "regulation or practice" in the instance of an adverse ruling by the DSB. Section 123(g) provides:

> In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until
>
> (A) the appropriate congressional committees have been consulted under subsection (f) of this section;
>
> (B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;
>
> (C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;
>
> (D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;
>
> (E) the Trade Representative and the head of the relevant department or agency have consulted with the

appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

We note, however, that zeroing is not established by regulation. Nor is zeroing a "practice" within the sense of Section 123(g). The Statement of Administrative Action gives a special meaning to the term "practice" as used in Section 123(g). There, "practice" is defined as an "administrative practice consisting of written policy guidance of general application." SAA, p. 352. As Commerce conceded in oral argument, there is no "written policy guidance of general application" with respect to zeroing. At best, the Department applies zeroing on an ad hoc, informal basis (even though it may have done so consistently). Thus, even were we to notice that Commerce often—or even always—zeroes, this would not constitute the existence of a "practice" that would be governed by Section 123(g). There is no "final rule or other modification" required for the Department to abandon zeroing.

Rather here, the original LTFV determination (and Commerce's use of zeroing) continues to stand solely because Commerce has not determined to withdraw it. But equally, Commerce has the power to adopt a WTO-consistent interpretation. *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* (WT/DS221/R) at 3.77-3.79.

In continuing to zero in this circumstance, Commerce does not enjoy the preclusive shield of Section 123/Section 129 from judicial or panel review found to exist by the CAFC in *Corus Staal.* Commerce's continued use of zeroing in this investigation (which results simply from the continuing applicability of the original determination to pre-April 27, 2005 entries) is subject to this Panel's review for lawful-

ness—which includes review of the determination's consistency with the demands of *Charming Betsy*.

We recognize the preclusive effect of the "statutory scheme" described by *Corus Staal*, but find that it does not operate with respect to WTO-inconsistent discretionary agency action taken prior to the effectiveness of Section 129 implementation. Once the United States has determined to implement the DSB decision and the Section 129 process is concluded, the decision by Commerce to maintain a retrospective determination that is inconsistent with the DSB decision is not shielded from the application of the *Charming Betsy* doctrine. The WTO *Softwood Lumber* Decision, which motivates our consideration of *Charming Betsy*, can no longer be described as "not adopted as per Congress's statutory scheme." Section 129 has run its course. Our resort to *Charming Betsy*, as an ordinary instance of statutory construction no way in conflicts with Section 102 [19 U.S.C. § 3512], or with Section 123 and Section 129 of the URAA [19 U.S.C. §§ 3533, 3538].

E. *On Charming Betsy*

At oral argument, the Department made the following four objections to our reconsideration of the zeroing issue:

> There are four basic points that Commerce would like to make with respect to [the zeroing] issue. First, reconsideration is not appropriate in this case. Second, Congress has adopted a comprehensive scheme for the Executive Branch in consultation with the legislative branch to determine whether and how to implement an adverse WTO report. Third, the *Charming Betsy* doctrine does not support reconsideration of [the zeroing] issue. Fourth, if despite these arguments, the panel nevertheless considers the WTO report, that report provides no persuasive guidance.

September 28, 2004 Transcript at 147.

We have dealt with the Department's first and second objections above. We now address its third and fourth arguments.

In oral argument, the Department asserted that the holding of the CAFC in *Timken* is controlling—and resort to *Charming Betsy is* foreclosed. In *Timken,* CAFC rejected a *Charming* Betsy-sourced challenge to zeroing based on the WTO DSB *EC – Bed Linen* decision.

The *EC – Bed Linen* decision did not involve a United States measure (the United States was not a party to that dispute) and dealt with an administrative review (and hence a different provision of the Antidumping Agreement), not an antidumping investigation. In contrast, the WTO *Softwood Lumber* Decision involves the use of zeroing by the United States in this very investigation and establishes its inconsistency with Article 2.4.2 of the Antidumping Agreement. Moreover, in the Final Section 129 Determination accepting and implementing the WTO *Softwood Lumber* Decision, the Department (and hence the United States) recognizes that zeroing is precluded. 70 Fed. Reg. at 22639 (May 2, 2005).

The CAFC in *Timken* did not exclude the possibility that a WTO DSB decision might conclusively establish that the Department's interpretation of the Tariff Act permitting zeroing is inconsistent with U.S. WTO obligations.[22] Accordingly, there now being a definitive finding in regard to zeroing—a finding which the United States has determined to accept—and given the absence of judicial authority controlling precisely this instance, we conclude the issue of *Charming Betsy*'s applicability is open for determination by this Panel.

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[22] As noted above, the CAFC did not address the Charming Betsy argument in *Corus Staal BV v. United States*, 395 F.3d 1343 (Fed. Cir. 2005).

This usual presumption—that Congress intends its laws to comply with international obligations—is reinforced in the context of the WTO obligations. The Statement of Administrative Action accompanying the URAA (which in turn includes the statutory provision of concern here) makes clear Congress' intent that U.S. antidumping law be consistent with WTO demands "[The URAA was] intended to bring U.S. law fully into compliance with U.S. obligations under the [WTO] agreements." SAA, H.R. Doc. No. 103-316 (1994) at 669]. And, according to 19 U.S.C. §3512(d), the Statement of Administrative Action "is an authoritative expression of the United States concerning interpretation and application of [the WTO Agreements and the implementing statutes] in any judicial proceeding."

The Federal Circuit has found the WTO Agreements to be international legal obligations for purposes *of Charming Betsy. See Federall Mogul Corp. v. United States,* 63 F. 3d 1572, 1581 (Fed. Cir. 1995); *Luigi Bormioli Corp. v. United States,* 304 F.3d 1362, 1368 (Fed. Cir. 2002). Although certain decisions of the Court of International Trade have demonstrated a reluctance to challenge agency action on *Charming Betsy* grounds involving WTO obligations, the courts were not faced with a situation in which a Department act was the very subject of a WTO DSB decision. While we note the caution expressed by the court in *SNR Roulements v. United States,* 118 F.Supp. 2d 1333 (Ct. Int'l Tr. 2000), *aff'd,* 402 F.3d 1358 (Fed. Cir. 2005) , we see no statutory or other reason for disregarding *Charming Betsy*'s imperative that the relevant agencies conduct themselves consistently with the WTO Agreements absent a statutory countermand.

The United States has accepted, as a party to the WTO's Dispute Settlement Understanding, that the WTO dispute settlement process serves "to clarify the existing provisions of the [WTO] agreements . . ." Article 3(2), WTO Dispute Settlement Understanding. The WTO *Softwood Lumber* Decision has established that zeroing, as applied by the

United States in this investigation, does violate the Antidumping Agreement.

Our decision does not purport to change U.S. antidumping law; rather it applies U.S. antidumping law (as appropriately interpreted through *Charming Betsy*) to agency action. DSB decisions are not directly binding on U.S. courts, nor—by implication—on NAFTA Chapter 19 binational panels. Indeed the URAA expressly provides that DSB rulings may not be grounds to set aside U.S. laws. 19 U.S.C. §3512. The limitation imposed by Section 3512, of course, only applies to statutes, not to agency action. The URAA does not render *Charming Betsy* unavailable as a rule of statutory construction. The obligations of the WTO Antidumping Agreement have been clarified in the WTO *Softwood Lumber* Decision, and that clarification was accepted by the United States in the Final Section 129 Determination.

We continue to hold (consistent with the CAFC) that the Tariff Act is ambiguous as to zeroing. While agencies enjoy presumptions of correctness with respect to the interpretation of ambiguous statutes, their discretion is limited to reasonable interpretations by operation of *Chevron* and limited further to interpretations consistent with the international legal obligations of the United States by *Charming Betsy*. The *Charming Betsy* doctrine is clearly part of United States law which this panel is obligated (by NAFTA Article 1904) to apply. An otherwise permissible agency interpretation—in the case of an ambiguous statute—which conflicts with an international legal obligation of the United States is unlawful if there is an alternatively available interpretation that is consistent with that obligation.

The WTO DSU design anticipates that a WTO member may respond to an adverse ruling in various ways—of which renunciation of an offending measure is the preferred but not sole option. Articles 21 & 22, DSU. A WTO member wishing to maintain an inconsistent measure may effectively do so—upon negotiation of compensation or by suffering

suspension of concessions. But we do not see the design of the DSU as diminishing to any extent the nature of the United States' WTO commitments as international legal obligations that—under *Charming Betsy*—restrict agency discretion.

F. *Conclusion of the Panel With Respect to Zeroing*

We find that the application of zeroing in this investigation is inconsistent with a United States international obligation and, by application of the *Charming Betsy* doctrine, to be unreasonable and not in accordance with law. The DSB decision in *Softwood Lumber* establishes with authority that the resort to zeroing in this investigation is not permitted by the Antidumping Agreement. The United States effectively concedes this in its Final Section 129 Determination.

As such, the application of zeroing by the Department in this investigation conflicts with an international legal obligation of the United States. Zeroing is not mandated by the statute; rather it is discretionary agency action that is subject to the *Charming Betsy* doctrine.

APPENDIX J

WORLD TRADE ORGANIZATION

WT/DS264/AB/R
11 August 2004
(04-3385)

Original: English

UNITED STATES—FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA

AB-2004-2

Report of the Appellate Body

* * * *

C. *Interpretation of Article 2.4.2*

1. *Introduction*

76. Article 2.4.2 of the *Anti-Dumping Agreement*[136] permits the use of three methodologies, applicable during the investigation phase, for establishing the existence of "margins of dumping". The first two methodologies are set out in the first sentence of Article 2.4.2, which provides that the existence of "margins of dumping" during an investigation phase "shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis." The third methodology is set out in the second sentence of Article 2.4.2, which provides that, under the specified circumstances, the existence of "margins of dumping" may be determined by comparing a weighted average normal value with prices of individual export transactions.

77. As stated above[137], this appeal is concerned with USDOC's use of zeroing in establishing the existence of "margins of dumping" using the first methodology specified under the first sentence of Article 2.4.2—"a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions". On this issue, the participants disagree as to the proper interpretation of the terms "margins of dumping" and "all comparable export transactions".

78. The United States asserts that, after having correctly found that "multiple averaging" is permitted under Article 2.4.2, the Panel erred in proceeding further and finding that

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[136] This provision is set out in para. 67 of this Report.

[137] See *supra*, para. 63.

the United States acted inconsistently with Article 2.4.2 "in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of 'zeroing'."[138] The United States argues that the term "margins of dumping" in Article 2.4.2 does not refer to margins of dumping for the product under investigation as a whole, but instead refers to "the results of comparing averages 'for each category of product/transaction compared'."[139] More specifically, "margins of dumping", according to the United States, is used in Article 2.4.2 to refer to the results of multiple comparisons "in which the normal value exceeds the export price".[140] Finally, the United States posits that Article 2.4.2 "does not address the issue of aggregating the results of multiple comparisons."[141]

79. The position of the United States hinges on two distinct propositions. *First*, that multiple averaging is permitted under Article 2.4.2 and that the term "all comparable export transactions" refers *only* to all comparable export transactions *within each sub-group*. *Secondly*, that the term "margins of dumping" in Article 2.4.2 does not refer to margins of dumping for the product as a whole, but instead refers to "margins of dumping" for individual product types in cases in which the investigating authority conducts multiple averaging. Thus, the United States argues that Article 2.4.2 deals only with multiple comparisons at sub-group levels, and does not address the issue of how the results of such comparisons are to be aggregated in order to calculate an overall margin of dumping for the product as a whole.

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[138] United States' appellant's submission, para. 73 (quoting Panel Report, para. 8.1(a)(i)).

[139] *Ibid.*, para. 37 (quoting Panel Report, para. 7.210).

[140] *Ibid.*, para. 22.

[141] *Ibid.*, para. 28.

80. We note that there is no disagreement among the participants in this dispute as to the permissibility of "multiple averaging" under Article 2.4.2. All participants agree that an investigating authority may choose to divide the product under investigation into product types or models[142] for purposes of calculating a weighted average normal value and a weighted average export price for the transactions involving each product type or model or sub-group of "comparable" transactions.[143] In addition, we note that Canada has not claimed, with regard to the investigation at issue, that the United States has acted inconsistently with Article 2.4.2 when calculating the weighted average normal value and weighted average export price for each sub-group of comparable transactions.

81. We agree with the participants in this dispute that multiple averaging is permitted under Article 2.4.2 to establish the existence of margins of dumping for the product under investigation. We disagree with those who suggest that

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[142] In this regard, the Panel notes that:

> [a]lthough multiple averaging based on different types or models may be particularly common, multiple averaging may also be used in other contexts. For example, an investigating authority might perform multiple averaging in respect of sales made at different levels of trade (e.g., retail versus wholesale) or on the basis of sub-periods of the period of investigation (the latter may arise in cases where hyper-inflationary economies are involved). Thus, an investigating authority might well resort to multiple averaging to ensure comparability even in a case of absolute product homogeneity, i.e., where all of the product under investigation is identical and is being compared to transactions involving identical goods in the market of the exporting country.

(Panel Report, para. 7.201 (footnote omitted))

[143] See United States' appellant's submission, para. 23; European Communities' third participant's submission, para. 30. See also Panel Report, para. 7.211. See also Panel Report, para. 7.202, where the Panel notes that there was no dispute as to the "appropriateness or consistency" with the *Anti-Dumping Agreement* of multiple averaging as such.

the Appellate Body Report in *EC – Bed Linen* is premised on an assumption that multiple averaging is prohibited. The issue of multiple averaging was not before the Appellate Body in *EC – Bed Linen* and the reasoning of the Appellate Body in that case should therefore not be read as prohibiting that practice. This is not to say that *EC – Bed Linen* is not relevant in this appeal. Indeed, there are a number of relevant findings to which we refer to below. However, the Appellate Body did not rule on multiple averaging in that case and therefore it is incorrect to argue, as the United States does, that "[t]he agreement of both parties to this dispute and a unanimous Panel that Article 2.4.2 permits multiple comparisons is a fundamental departure from the premise"[144] of the Appellate Body Report in *EC – Bed Linen*.

82. Although all participants in this dispute agree on the permissibility of multiple averaging, they disagree as to the proper interpretation of the terms "all comparable export transactions" and "margins of dumping" in Article 2.4.2 as they relate to zeroing. The United States argues that once "all comparable export transactions" have been taken into account at the sub-group level, the requirement of Article 2.4.2 is satisfied and that, therefore, the obligation to consider "all comparable export transactions" does not extend to the aggregation stage. A contrary interpretation of Article 2.4.2 would, according to the United States, require investigating authorities to compare "dumped" and "non-dumped" transactions, which the United States considers to be non-comparable, at the aggregation stage.

83. In contrast, Canada argues that the "word 'all' operates to ensure that every transaction is fully included in the calculation of the dumping margin"[145] and that the word "'comparable' must relate to the entire product under consid-

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[144] United States' appellant's submission, para. 60.

[145] Canada's appellee's submission, para. 23.

eration."[146] Canada further submits that the United States' definition of the word "comparable" is "inconsistent with its own practice"[147] and that "[t]here is no difference as to comparability between different models that are dumped versus those that are not dumped."[148] The European Communities similarly submits that "[t]he United States misinterprets the term 'comparable transactions' in Article 2.4.2"[149], and that "[o]nce the multiple averaging method-ology has been applied, all transactions are considered 'comparable'."[150]

84. The second area of their disagreement concerns the proper interpretation of the term "margins of dumping" as used in Article 2.4.2. That disagreement turns on the question of whether that term applies to the product under investigation as a whole, or, at the sub-group level, when multiple averaging is undertaken.

85. With these considerations in mind, we turn next to examine the terms "all comparable export transactions" and "margins of dumping" as they apply to this dispute. As both of these terms occur in the same sentence and relate to establishing the existence of margins of dumping under Article 2.4.2, we emphasize that they should be interpreted in an integrated manner.

2. *"All Comparable Export Transactions" in Article 2.4.2*

86. Article 2.4.2 requires that the existence of margins of dumping "shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all comparable export*

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[146] *Ibid.*, para. 24.

[147] *Ibid.*, para. 36.

[148] *Ibid.*, para. 37.

[149] European Communities' third participant's submission, para. 29.

[150] *Ibid.*, para. 33.

transactions". (emphasis added) It is clear from the language of Article 2.4.2 that a weighted average normal value is to be compared with a weighted average of the prices of "comparable" export transactions, and not with prices of "non-comparable" export transactions. At the same time, the word "all" in "all comparable export transactions" makes it clear that Members cannot exclude from a comparison any transaction that is "comparable". Thus, we agree with the Panel that the term "all comparable export transactions" means that a Member "may only compare those export transactions which are comparable, but [] it must compare *all* such transactions."[151]

87. It is not in dispute in this case that, in the calculation of the weighted average export price for each sub-group, USDOC took into account "all comparable export transactions", and thus no comparable export transactions were excluded at the sub-group level.[152]

88. However, the participants have divergent views with respect to the aggregation of the results of the multiple comparisons of "all comparable export transactions". The United States is of the view that Article 2.4.2 does not require the aggregation of the results of such comparisons, and that, even if there were such a requirement, it would be permissible to exclude the results of those comparisons where the weighted average normal value is less than the weighted average export price (which comparisons according to the

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[151] Panel Report, para. 7.204. (original emphasis) In response to questioning at the oral hearing, all the participants and third participants indicated that they agreed with this interpretation.

[152] The United States stated at the oral hearing that the United States and Canada "both agree that the United States made comparisons between comparable subsets of export and normal value transactions based on distinctions in level of trade and physical characteristics. Additionally, the United States and Canada both agree that when these comparisons were made, all comparable transactions were included in the subsets." (United States' statement at the oral hearing)

United States constitute "non-dumped comparisons"). The United States emphasizes that Article VI:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") "explicitly *condemns* dumping"[153] and that the *Anti-Dumping Agreement* "does not recognize a 'negative dumping margin'."[154] As we understand it, the United States is of the view that a requirement to include results of "non-dumped" comparisons at the aggregation stage would amount to giving offsets unjustifiably to "dumped" amounts from "non-dumped" amounts.

89. In contrast, Canada, the European Communities, India, and Japan are of the view that the terms "dumping" and "dumping margins" in the *Anti-Dumping Agreement* apply to the product under investigation *as a whole*, and that, therefore, the results of multiple comparisons must be aggregated in their entirety to establish the existence of margins of dumping for the product *as a whole*. In their view, the *Anti-Dumping Agreement* does not permit a determination of "dumping" at the level of a product type or model. Moreover, according to Canada and the European Communities, treating comparisons at the sub-group level as "dumped" or "non-dumped" is inconsistent with Article 2.4.2 and amounts to "prejudging" the outcome of an analysis to determine whether dumping exists for the product under investigation as a whole.

90. There is no basic disagreement among the participants that "all comparable export transactions" must be taken into account in establishing margins of dumping. Rather, the participants' disagreement centres on how the results of multiple comparisons are interpreted and aggregated when all comparable transactions have admittedly been taken into

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[153] United States' appellant's submission, para. 44. (original underlining)

[154] *Ibid.*, para. 38.

account at the sub-group level.[155] And this disagreement flows, in essence, from the participants' respective interpretations of the terms "dumping" and "margins of dumping" in the *Anti-Dumping Agreement*—whether these terms apply at the product or sub-product level. We therefore turn now to an analysis of these terms as used in Article 2.4.2 of the *Anti-Dumping Agreement*.

3. *"Margins of Dumping" in Article 2.4.2*

91. As we noted above, the United States' position rests on the proposition that "margins of dumping" can be established, and "dumping" can be found, at the *sub-group level*. According to the United States, the term "margins of dumping" in Article 2.4.2 refers to the results of those multiple comparisons "in which the normal value exceeds the export price".[156] In addressing this argument, we turn first to Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, which define "dumping" in the context of the GATT 1994 and the *Anti-Dumping Agreement*, respectively.

92. Specifically, Article VI:1 defines "dumping" as occurring where "*products* of one country are introduced into the commerce of another country at less than the normal value of the *products*". (emphasis added) This definition is reiterated in Article 2.1 of the *Anti-Dumping Agreement*, which provides that:

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[155] See *supra*, footnote 152.

[156] United States' appellant's submission, para. 22. At the oral hearing the United States stated that "'margins of dumping' is the term used in Article 2.4.2 to describe the results of those multiple comparisons when the normal value is greater than the export price. If the normal value is less than or equal to the export price, that comparison did not involve dumping and there is no margin of dumping for that comparison." (United States' statement at the oral hearing)

Article 2

Determination of Dumping

> 2.1 For the purpose of this Agreement, a *product* is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the *product* exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like *product* when destined for consumption in the exporting country. (emphasis added)

93. It is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority. Moreover, we note that the opening phrase of Article 2.1—"[f]or the purpose of this Agreement"—indicates that the definition of "dumping" as contained in Article 2.1 applies to the entire Agreement, which includes, of course, Article 2.4.2. "Dumping", within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product.

94. Other provisions of the *Anti-Dumping Agreement* confirm this view. For example, Article 9.2 (as well as Article VI:2 of the GATT 1994) stipulate that an anti-dumping duty is to be imposed in respect of the *product* under investigation.[157] In addition, Article 6.10 of the *Anti-Dumping*

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[157] Article 9.2 of the *Anti-Dumping Agreement* provides in relevant part:

> *Article 9*
> *Imposition and Collection of Anti-Dumping Duties*
>
> . . .
>
> 9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such

Agreement provides that the investigating authorities "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned *of the product under investigation*". (emphasis added)

95. Having examined the definition of "dumping", we now turn to examine the term "margin of dumping" as defined in Article VI:2 of the GATT 1994, second sentence, which provides that:

> ... the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1 [of Article VI of the GATT 1994]. (footnote omitted)

96. The Appellate Body found in *EC – Bed Linen* that "[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can only be, established for the *product* under investigation as a whole."[158] While "dumping" refers to the introduction of a product into the commerce of another country at less than its normal value, the term "margin of dumping" refers to the magnitude of dumping. As with dumping, "margins of dumping" can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product.

97. It is clear that an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation. In our view, the results of the multiple comparisons at the sub-group level are, however, not "margins of dumping" within the meaning of Article 2.4.2.

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product from all sources found to be dumped and causing injury ... . (emphasis added)

[158] Appellate Body Report, *EC – Bed Linen*, para. 53. (original emphasis) The Appellate Body further explained in *US – Hot-Rolled Steel* that "'margins' means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product." (Appellate Body Report, *US – Hot-Rolled Steel*, para. 118) (footnote omitted)

Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these "intermediate values" that an investigating authority can establish margins of dumping for the product under investigation as a whole.

98. We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the "results" of the multiple comparisons for *all* product types. There is no textual basis under Article 2.4.2 that would justify taking into account the "results" of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other "results". If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2. Thus we disagree with the United States that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons.

99. Our view that "dumping" and "margins of dumping" can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. Thus, having defined the product under investigation, the investigating authority must treat that *product* as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-Dumping Agreement*, an anti-dumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole, and export

transactions in the so-called "non-dumped" sub-groups (that is, those sub-groups in which the weighted average normal value is less than the weighted average export price) are not excluded. We see no basis, under the *Anti-Dumping Agreement*, for treating the very same sub-group transactions as "non-dumped" for one purpose and "dumped" for other purposes. Indeed, in the anti-dumping investigation at issue in this dispute, the product as a whole—softwood lumber—has been treated as a "dumped" product, except at the stage of zeroing.

100. Moreover, we observe that Article 2.4.2 contains no express language that permits an investigating authority to disregard the results of multiple comparisons at the aggregation stage. Other provisions of the *Anti-Dumping Agreement* are explicit regarding the permissibility of disregarding certain matters. For example, Article 2.2.1 of the *Anti-Dumping Agreement*, which deals with the calculation of normal value, sets forth the *only* circumstances under which sales of the like product may be disregarded.[159] Similarly, Article 9.4 of the *Anti-Dumping Agreement* expressly directs investigating authorities to "disregard" zero and *de minimis* margins of dumping, under certain circumstances, when calculating the weighted average margin of dumping to be applied to exporters or producers that have not been individually investigated. Thus, when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly.

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[159] Article 2.2.1 of the *Anti-Dumping Agreement* stipulates that:

> [s]ales of the like product in the domestic market of the exporting country ... *may be disregarded* in determining normal value *only if* the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. (footnotes omitted; emphasis added)

101. We now turn to the implications of zeroing as applied in this case.[160] Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price.[161] Zeroing thus inflates the margin of dumping for the product as a whole.

102. We understand the United States to argue that a prohibition of zeroing would amount to a requirement to compare "dumped" and "non-dumped" transactions at the aggregation stage. The United States contends that results of multiple comparisons in which the weighted average normal value exceeds the weighted average export price may be excluded because they do not involve "dumping". As we have stated earlier, the terms "dumping" and "margins of dumping" in Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the product under investigation as a whole and do not apply to sub-group levels. The treatment of comparisons for which the weighted average normal value is less than the weighted average export price as "non-dumped" comparisons is therefore not in accordance with the requirements of Article 2.4.2 of the *Anti-Dumping Agreement*.

103. For all these reasons, we do not agree with the United States that the results of comparisons at the sub-group level constitute margins of dumping. Nor do we agree with the United States that the results of the comparisons in which the weighted average normal value is less than the weighted average export price could be excluded in calculating a

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[160] For a description of zeroing, see *supra*, para 64.

[161] We note that the Panel reached the same conclusion in para. 7.216 of its Report.

margin of dumping for the product under investigation as a whole.

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8. *Conclusion*

117. In the light of the foregoing, we uphold the Panel's finding that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of "zeroing".[182]

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[182] Panel Report, paras. 7.224 and 8.1(a)(i).

APPENDIX K

WORLD TRADE ORGANIZATION

WT/DS141/AB/R
1 March 2001
(01-0973)

Original: English

EUROPEAN COMMUNITIES—ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA

AB-2000-13

Report of the Appellate Body

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IV. Article 2.4.2 of the *Anti-Dumping Agreement*

46. The first issue raised in this appeal is whether the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is consistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

47. The practice of "zeroing", as applied in this dispute, can briefly be described as follows[16]: first, the European Communities identified with respect to the product under investigation—cotton-type bed linen—a certain number of different "models" or "types" of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the European Communities established a "*positive* dumping margin" for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the European Communities established a "*negative* dumping margin" for each model.[17] Thus, there is a "positive dumping margin" where there *is* dumping, and a "negative dumping margin" where there *is not*. The "positives" and "negatives" of the amounts in this calculation are an indication of precisely *how much* the export price is above or below the normal value. Having made this calculation, the European Communities then added up the amounts it had calculated as "dumping margins" for each

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[16] For a more detailed description, see Panel Report, para. 6.102.

[17] For these latter models, in other words, dumping had not occurred, as the *export price exceeded the normal value*.

model of the product in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the European Communities treated any "negative dumping margin" as zero—hence the use of the word "zeroing". Then, finally, having added up the "positive dumping margins" and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.

48. With respect to this first issue appealed, the Panel found that:

> . . . the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.[18]

49. The European Communities appeals this finding. In defending its practice of "zeroing", the European Communities principally argues that the Panel was mistaken about the ordinary meaning of Article 2.4.2. According to the European Communities, Article 2.4.2 requires a comparison with a "weighted average of prices of all *comparable* export transactions" (emphasis added), which, in the view of the European Communities, as we understand it, is not the same as requiring a comparison with a weighted average of *all* export transactions. Emphasizing the presence in Article 2.4.2 of the word "comparable", the European Communities maintains that, where the product under investigation consists of various "non-comparable" types or models, the investigating authorities should first calculate "margins of dumping" for each of the "non-comparable" types or models,

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[18] Panel Report, para. 6.119.

and, then, at a subsequent stage, combine those "margins" in order to calculate an overall margin of dumping for the product under investigation. Thus, the European Communities sees two stages in calculating margins of dumping in such an anti-dumping investigation, and contends that Article 2.4.2 provides *no guidance* as to how the "margins of dumping" for each of the types or models should be combined in the second stage in order to calculate an overall margin of dumping for the product under investigation. On this reasoning, the European Communities asserts that, as "zeroing" takes place during this second stage of the domestic anti-dumping process, "zeroing" cannot be inconsistent with Article 2.4.2. Accordingly, the European Communities concludes that the Panel failed to give proper meaning to the word "comparable" as well as to the comparability requirement in Article 2.4.2[19], erroneously applied Article 2.4.2 to the calculation of the overall margin of dumping for the product under investigation[20], and erred in its overall analysis of this issue on the premise that dumping margins can be established only for a *product*.[21]

50. As always, we turn first to the text of the provision at issue on appeal. Article 2.4.2 of the *Anti-Dumping Agreement* states:

> Subject to the provisions governing fair comparison in paragraph 4, the *existence of margins of dumping* during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-

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[19] European Communities' appellant's submission, paras. 14-20 and 38-41.

[20] European Communities' appellant's submission, paras. 21-30.

[21] European Communities' appellant's submission, paras. 31-37.

> transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

51. Article 2.4.2 of the *Anti-Dumping Agreement* explains how domestic investigating authorities must proceed in establishing "the existence of margins of dumping", that is, it explains how they must proceed in establishing that there *is* dumping. Toward this end, Article 2.1 states:

> For the purpose of this Agreement, a *product is to be considered as being dumped*, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added)

From the wording of this provision, it is clear to us that the *Anti-Dumping Agreement* concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*.

52. We observe that, in this case, the European Communities defined the *product* at issue in its anti-dumping investigation as follows:

> The *proceeding covers bed linen of cotton–type fibres*, pure or mixed with man-made fibres or flax, bleached, dyed or printed. Bed linen includes bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets.

. . .

> Notwithstanding the *different possible product types* due to different weaving construction, finish of the fabric, presentation and size, packing, etc., *all of them constitute a single product for the purpose of this proceeding* because they have the same physical characteristics and essentially the same use.[22] (emphasis added)

53. Thus, of its own accord, the European Communities clearly identified cotton-type bed linen as the *product* under investigation in this case. This is undisputed in this appeal. Having defined the *product* as it did, the European Communities was bound to treat that *product* consistently thereafter in accordance with that definition. Thus, it follows that, with respect to Article 2.4.2, the European Communities had to establish "the existence of margins of dumping" for the *product*—cotton-type bed linen—and not for the various types or models of that product. We see nothing in Article 2.4.2 or in any other provision of the *Anti-Dumping Agreement* that provides for the establishment of "the existence of margins of dumping" for *types or models* of the product under investigation; to the contrary, all references to the establishment of "the existence of margins of dumping" are references to the *product* that is subject of the investigation. Likewise, we see nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the *Anti-Dumping Agreement*, nor to justify the distinctions the European Communities contends can be made among *types or models* of the same product on the basis of these "two stages". Whatever the method used to calculate the margins of dumping, in our view, these margins must be,

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[22] Commission Regulation (EC) No 1069/97, *supra*, footnote 3, para. 10. See also Council Regulation (EC) No 2398/97, *supra*, footnote 4, para. 9.

and can only be, established for the *product* under investigation as a whole. We are unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an *overall* margin of dumping for the product under investigation.

54. With this in mind, we recall that Article 2.4.2, first sentence, provides that "the existence of margins of dumping" for the product under investigation shall normally be established according to one of two methods. At issue in this case is the first method set out in that provision, under which "the existence of margins of dumping" must be established:

> . . . on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions . . .

55. Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of "all" comparable export transactions. As explained above, when "zeroing", the European Communities counted as zero the "dumping margins" for those models where the "dumping margin" was "negative". As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value . . . despite the fact that it was, in reality, higher than the weighted average normal value."[23] By "zeroing" the "negative dumping margins", the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn,

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[23] Panel Report, para. 6.115.

inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions—that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of "zeroing" at issue in this dispute—is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.

56. We are mindful that Article 2.4.2 provides for "a comparison of a weighted average normal value with a weighted average of prices of all *comparable* export transactions". (emphasis added) In our view, the word "comparable" in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of "a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions". (emphasis added)

57. The ordinary meaning of the word "comparable" is "able to be compared".[24] "Comparable export transactions" within the meaning of Article 2.4.2 are, therefore, export transactions that are able to be compared. The European Communities argues before us that export transactions involving different types or models of cotton-type bed linen are not "comparable" because different types or models of cotton-type bed linen have very different physical characteristics. Specifically, the European Communities suggests that the differences between the various models or types of bed linen

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[24] *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 269.

involved in the relevant export transactions are "so substantial that they cannot be eliminated by making adjustments for differences in physical characteristics".[25] However, as we have already noted, at the very outset of its anti-dumping investigation, the European Communities identified, of its own accord, cotton-type bed linen as the *product* under investigation. Moreover, in defining cotton-type bed linen as the product at issue, the European Communities stated that "the *different* possible *product types . . . constitute a single product* for the purpose of this proceeding because *they have the same physical characteristics* and *essentially the same use*".[26] (emphasis added) Furthermore, we observe that, in the context of defining the product at issue, the European Communities also made the following determination relating to the identity of the "like product" on the Community market subject to its investigation:

> The Commission examined whether cotton-type bed linen produced by the Community industry and sold on the Community market, as well as cotton-type bed linen produced in Egypt, India and Pakistan and sold on the Community market and on their domestic markets were alike.
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> . . .
>
> The Commission concluded that although there were differences in the mix of products produced in the Community and that sold for export to the Community or sold domestically in the countries concerned, *there were no differences in the basic characteristics and uses of the different types and qualities of bed linen of cotton-type fibres*. Therefore domestic and export types in the

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[25] European Communities' appellant's submission, para. 39. See also para. 40 and footnote 34 of the European Communities' appellant's submission.

[26] Commission Regulation (EC) No 1069/97, *supra*, footnote 3, para. 10.

> countries concerned and types produced in the Community were considered *like products* within the meaning of Article 1(4) of Regulation (EC) No 384/96 . . . [27] (emphasis added)

58. Having defined the product at issue and the "like product" on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not "comparable". All types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2.

59. This interpretation of the word "comparable" in Article 2.4.2 is reinforced by the context of this provision. Article 2.4 of the *Anti-Dumping Agreement* states in relevant part:

> A *fair comparison* shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance* shall be made in each case, on its merits, *for differences which affect price comparability*, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. (emphasis added)

Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is

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[27] Commission Regulation (EC) No 1069/97, *supra*, footnote 3, paras. 11 and 14. See also Council Regulation (EC) No 2398/97, *supra*, footnote 4, para. 9.

a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]". Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that "due allowance" be made for differences affecting "price comparability". We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for "differences in . . . physical characteristics".

60. We note that, while the word "comparable" in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a "fair comparison" between export price and normal value and "price comparability". Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word "comparable" in Article 2.4.2. In our view, the word "comparable" in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value. The European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.[28]

61. In support of its appeal of the Panel's interpretation of Article 2.4.2, the European Communities argues, additionally, that this interpretation would not allow Members to counter dumping "targeted" to certain types of the product under

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[28] See *supra*, paras. 57-58.

investigation.[29] With respect to the notion of "targeted" dumping, we note that Article 2.4.2, second sentence, states:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find *a pattern of export prices which differ significantly among different purchasers, regions or time periods*, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

62. This provision allows Members, in structuring their anti-dumping investigations, to address three kinds of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the *Anti-Dumping Agreement* refers to dumping "targeted" to certain "models" or "types" of the same product under investigation. It seems to us that, had the drafters of the *Anti-Dumping Agreement* intended to authorize Members to respond to such kind of "targeted" dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation. Furthermore, we are bound to add that, if the European Communities wanted to address, in particular, dumping of certain types or models of bed linen, it could have defined, or redefined, the *product* under investigation in a narrower way.[30]

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[29] European Communities' appellant's submission, paras. 46-49.

[30] The European Communities also argues in its appellant's submission, paras. 42-45, that the Panel's interpretation of Article 2.4.2 would disadvantage those importing Members which collect anti-dumping duties

63. Finally, the European Communities argues that the Panel did not establish that the interpretation of Article 2.4.2 by the European Communities was "impermissible" and that, therefore, the Panel failed to apply the standard of review laid down in Article 17.6(ii) of the *Anti-Dumping Agreement*.[31] On this, we observe that Article 17.6(ii) states:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

64. In this case, the Panel explicitly recognized that it was to interpret the *Anti-Dumping Agreement* in accordance with the customary rules of interpretation of public international law as set out in the *Vienna Convention*.[32] Having interpreted Article 2.4.2 accordingly, the Panel found:

> . . . that the European Communities acted *inconsistently* with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price

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on a "prospective" basis when compared to those importing Members which collect anti-dumping duties on a "retrospective" basis. We note, though, that Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of "the existence of margins of dumping". Rules relating to the "prospective" and "retrospective" collection of anti-dumping duties are set forth in Article 9 of the *Anti-Dumping Agreement*. The European Communities has not shown how and to what extent these rules on the "prospective" and "retrospective" collection of anti-dumping duties bear on the issue of the establishment of "the existence of dumping margins" under Article 2.4.2.

[31] European Communities' appellant's submission, paras. 50-58.

[32] Panel Report, para. 6.46.

differences calculated for some models of bed linen.[33] (emphasis added)

65. It appears clear to us from the emphatic and unqualified nature of this finding of inconsistency that the Panel did not view the interpretation given by the European Communities of Article 2.4.2 of the *Anti-Dumping Agreement* as a "permissible interpretation" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*. Thus, the Panel was not faced with a choice among multiple "permissible" interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, to borrow a word from the European Communities, "impermissible". We do not share the view of the European Communities that the Panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*.

66. For all these reasons, we uphold the finding of the Panel in paragraph 6.119 of the Panel Report that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

* * * *

[33] Panel Report, para. 6.119.

APPENDIX L

WORLD TRADE ORGANIZATION

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

("Anti-dumping Agreement")

* * * *

Members hereby *agree* as follows:

PART I

* * * *

Article 2: Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

* * * *

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price

comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average

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[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[8] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

* * * *

APPENDIX M

103d Congress, 2d Session House Document 103-316, Vol. 1

URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING DOCUMENTS

* * * *

[656] THE URUGUAY ROUND AGREEMENTS ACT

STATEMENT OF ADMINISTRATIVE ACTION

* * * *

As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track trade bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the law. Furthermore, the Administration understand that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.

* * * *

[669] d. Relationship to Federal Law

Section 102 establishes the relationship between the Uruguay Round agreements and U.S. law. The implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is intended to bring U.S. law fully into compliance with U.S. obligations under those agreements. The bill accomplishes that objective with respect to federal legislation by amending existing federal statutes that would otherwise be inconsistent with the agreements and, in certain instances, by creating entirely new provisions of law.

[670] As section 102(a)(2) of the bill makes clear, those provisions of U.S. law that are not addressed by the bill are left unchanged. An illustrative list of federal environmental and health measures that are not amended by the bill is set out at the end of this part of the Statement.

Section 102(a)(1) clarifies that no provision of a Uruguay Round agreement will be given effect under domestic law if it is inconsistent with federal law, including provisions of federal law enacted or amended by the bill. Section 102(a)(1) will not prevent implementation of federal statutes consistently with the Uruguay Round agreements, where permissible under the terms of such statutes. Rather, the section reflects the Congressional view that necessary changes in federal statutes should be specifically enacted rather than provided for in a blanket preemption of federal statutes by those agreements.

The administration has made every effort to include all laws in the implementing bill and identify all administrative actions in this Statement that must be changed in order to conform with the new U.S. rights and obligations arising from the Uruguay Round agreements. Those include both regulations resulting from statutory changes in the bill itself and changes in laws, regulations and rules or orders that can be implemented without change in the underlying U.S. statute.

Accordingly, at this time it is the expectation of the Administration that no changes in existing federal law, rules, regulations, or order other than those specifically indicated in the implementing bill and this Statement will be required to implement the new international obligations that will be assumed by the United States under the Uruguay Round agreements. Should it prove otherwise, the Administration would need to seek new legislation from Congress or, if a change in regulation is required, follow normal agency procedures for amending regulations.

* * * *

[820] 1. *Definition of Dumping*

Sections 223 and 224 of the bill amend sections 772 and 773 of the Act, establishing new rules regarding the determination of export price or constructed export price and

normal value. Under new section 773(a), as under existing law, the preferred method for identifying and measuring dumping is to compare home market sales of the foreign like product to export sales to the United States. Consistent with the Agreement, if home market sales of a foreign like product do not exist or are not useable as a basis for determining normal value, Commerce may identify and measure dumping by comparing the export price or constructed export price to normal value based on either: (1) sales of the foreign like product to a country other than the United States; or (2) constructed value. The requirement of Article 2.4 of the Agreement that a fair comparison be made between the export price or constructed export price and normal value is stated in and implemented by section 773. To achieve such a fair comparison, section 773 provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability.

* * * *

[1027] In some cases, implementation of section 129 may render moot all or some issues in pending litigation in connection with the agency's initial determination. For example, should the Trade Representative direct Commerce to implement a section 129 determination that changes the cash deposit rate, such action could render moot any pending domestic litigation solely involving the amount of the cash deposit rate, as opposed to the validity of the underlying antidumping or countervailing duty order. If, by contrast, the litigation also involved the validity of the original determination, the court or binational panel would still have to render an opinion on that subject.

* * * *

[1032] The DSU recognizes that it may not be possible for a government to agree to the removal of a measure that a panel has found to be inconsistent with a Uruguay Round agreement. Accordingly, it provides for alternative resolu-

tions, including the provision of trade compensation and other negotiated settlements, or the suspension of benefits equivalent to the "nullification or impairment" of benefits caused by the offending measure. In all cases following a panel report, the DSU leaves to the discretion of the United States any change in [1033] federal or state law and the manner in which any such change may be implemented—whether through the adoption of legislation, a change in regulation, judicial action, or otherwise.

* * * *

2

Supreme Court, U.S.
FILED
DEC - 6 2005
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No. 05-364

In The
Supreme Court of the United States

CORUS STAAL BV AND
CORUS STEEL USA INC.,

Petitioners,

v.

DEPARTMENT OF COMMERCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the U.S. Court of Appeals for the Federal Circuit upholding the Department of Commerce's use of the so-called "zeroing" methodology is in conflict with the decision of a North American Free Trade Agreement ("NAFTA") Binational Panel and its reliance on certain World Trade Organization ("WTO") rulings regarding zeroing.

2. Whether the decision of the Federal Circuit is in conflict with the decisions of other circuits as to the role of *Charming Betsy* in cases involving *Chevron* deference to an agency's interpretation of an ambiguous statute.

3. Whether the Federal Circuit correctly accorded deference to Commerce's interpretation of the U.S. antidumping statute based on the foreign policy implications of its determination and given the statutory scheme established by Congress for the adoption of WTO decisions.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows: (1) the petitioners, Corus Staal BV and Corus Steel USA Inc. and (2) the respondents, the United States Department of Commerce and United States Steel Corporation.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent United States Steel Corporation does not have a parent company. In addition, no publicly held company owns 10% or more of United States Steel Corporation's stock.

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In The
Supreme Court of the United States

No. 05-364

CORUS STAAL BV AND
CORUS STEEL USA INC.,

Petitioners,

v.

DEPARTMENT OF COMMERCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, Respondent United States Steel Corporation ("U.S. Steel") hereby submits this brief in opposition to the petition for a writ of certiorari filed by Petitioners Corus Staal BV and Corus Steel USA Inc. (collectively "Corus").

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit (Pet. App. 1a-10a) is reported at 395 F.3d 1343 (Fed. Cir. 2005). The order of the Federal Circuit denying the petition for rehearing and rehearing en banc (Pet. App. 61a-62a) is unreported.

The opinions of the U.S. Court of International Trade are reported at 283 F. Supp. 2d 1357 (Ct. Int'l Trade 2003) (Pet. App. 11a) and 259 F. Supp. 2d 1253 (Ct. Int'l Trade 2003) (Pet. App. 12a-46a).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Federal Circuit was entered on January 21, 2005. Corus' petition for rehearing and rehearing en banc was denied on May 18, 2005. On July 28, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 15, 2005, and Corus' petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Statutory Framework Relating to Determinations of Dumping

The U.S. trade laws provide remedies to domestic industries that have been harmed by unfairly traded imports. In particular, the Tariff Act of 1930, as amended (the "Act"), provides for the imposition of antidumping duties where a domestic industry has been injured or threatened with injury by imports of products sold at less than fair value (i.e., products that have been "dumped") in the United States. 19 U.S.C. § 1673 (2000). Section 731 of the Act provides for the imposition of antidumping duties "in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id.* The "normal value" is typically the price at which the subject merchandise is sold in the home market of the foreign exporter or producer whereas the "export price" or

"constructed export price" is the price at which the subject merchandise is sold in the United States. *See id.* §§ 1677a(a), 1677b(a)(1)(B)(i).

Before determining whether subject merchandise is being dumped, the U.S. Department of Commerce ("Commerce") makes certain adjustments to the normal value and the export price or constructed export price of the subject merchandise to make a "fair comparison" between the two. *See id* § 1677b(a). The statute specifies exactly which adjustments are to be made to achieve the required "fair comparison." *See id.*

Once Commerce has made the required adjustments, it must calculate a "dumping margin" for each individual product type and then aggregate the results of those calculations to determine an overall "weighted average dumping margin" for each exporter and producer that is investigated. *Id.* §§ 1673d(c)(1)(B)(i), 1677(35)(A), (B). Section 771(35) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *Id.* § 1677(35)(A). Moreover, Section 771(35) defines "weighted average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices of such exporter or producer." *Id.* § 1677(35)(B).

Pursuant to Commerce's longstanding interpretation of the statute, a "dumping margin" exists only when the normal value "exceeds" the export price or constructed export price by a positive value. Thus, if the export price or constructed export price is equal to or higher than the normal value, Commerce determines there is no, or zero, "dumping

margin" for such sales and nothing to include when summing the "aggregate dumping margins" that constitute the numerator in the calculation of the "weighted average dumping margin" under the statute. The denominator of this calculation includes all export and constructed export prices, including those where the comparison to normal value resulted in no, or zero, "dumping margin." This has the effect of lowering the "weighted average dumping margin" because it increases the denominator.

Commerce's methodology of treating non-dumped sales as having a zero "dumping margin" (*i.e.*, the so-called "zeroing" methodology) has been repeatedly upheld as reasonable by the U.S. Court of International Trade (the "CIT") and the U.S. Court of Appeals for the Federal Circuit. The CIT and the Federal Circuit have recognized that the use of zeroing in calculating a company's dumping margin produces more accurate results by combating the problem of masked dumping. *See Timken Co. v. United States*, 354 F.3d 1334, 1343 (Fed. Cir.), *cert. denied*, ___ U.S. ___,125 S. Ct. 412, 160 L. Ed. 2d 352 (2004) ("*Timken*"); *PAM, S.p.A. v. U.S. Dep't of Commerce*, 265 F. Supp. 2d 1362, 1371 (Ct. Int'l Trade 2003); *Serampore Industries Pvt. Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360-61 (Ct. Int'l Trade 1987). As the Federal Circuit determined in *Timken*, zeroing "legitimately combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." *Timken*, 354 F.3d at 1343.

II. Statutory Framework Relating to the Treatment of the Uruguay Round Agreements and World Trade Organization Dispute Settlement Decisions

In 1994, the United States became a signatory and party to the Uruguay Round Agreements and, as a result, a

Member of the WTO. The Uruguay Round Agreements, including the Anti-Dumping Agreement, are not self-executing, and they have been implemented in U.S. law by the Uruguay Round Agreements Act (the "URAA"). *See* 19 U.S.C. § 3501 *et seq.*

In the URAA, Congress established explicit rules for resolving conflicts between U.S. law and the Uruguay Round Agreements. Specifically, Section 102(a) of the URAA clearly and unequivocally states that "{n}o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." *Id.* § 3512(a)(1). Section 102(a) further provides that "{n}othing in this Act shall be construed . . . to limit any authority conferred under any law of the United States . . . unless specifically provided for in this Act." *Id.* § 3512(a)(2).

Congress also included detailed rules in the URAA specifying how, if at all, the United States would respond to adverse decisions issued by WTO panels or the Appellate Body under the WTO Dispute Settlement Understanding. Section 123(g)(1) of the URAA expressly provides that where a WTO panel or the Appellate Body finds that a regulation or practice of an agency such as Commerce is inconsistent with one of the Uruguay Round Agreements, "that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until" every one of six separate actions are taken. *Id.* § 3533(g)(1). These actions include consultations among Congress, the United States Trade Representative ("USTR"), and the agency in question, consultations with the relevant private sector advisory committees, submission of a report to the appropriate congressional committees, and provision of

notice and an opportunity to comment on the proposed modification to the public. *Id.*

If a WTO panel or the Appellate Body finds that Commerce's determination in a particular case is inconsistent with one of the Uruguay Round Agreements, Section 129(b) of the URAA provides that USTR shall consult with Commerce and the appropriate congressional committees on the matter. *Id.* § 3538(b)(1). After such consultations, USTR may request Commerce to issue a determination to implement the WTO panel or Appellate Body report. *Id.* § 3538(b)(2). Before this determination may be implemented, USTR must consult again with Commerce and the appropriate congressional committees. *Id.* § 3538(b)(3). Thereafter, USTR "may" direct Commerce to implement its new determination "in whole or in part." *Id.* § 3538(b)(4).

The URAA specifically recognizes, in accordance with the WTO's Dispute Settlement Understanding, that the United States may choose to implement or not to implement the recommendations made in a panel or Appellate Body report. *See id.* § 3533(f)(3) (requiring USTR to consult with the appropriate congressional committees "concerning whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation") (emphasis added); *id.* § 3538(b)(4) (providing that after consultation with Commerce and the appropriate congressional committees, USTR "may" direct implementation of the recommendations contained in a report "in whole or in part"). Likewise, the Statement of Administrative Action (the "SAA") approved by Congress in conjunction with the URAA[1] explicitly states

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[1] Congress has specifically directed that the URAA is to be interpreted and applied in accordance with the SAA. Indeed, by statute, Congress directed that the SAA must be regarded as "an authoritative expression

that WTO panels and the Appellate Body "will not have any power to change U.S. law or order such a change" and that panel and Appellate Body decisions have "no binding effect." Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("SAA") at 659, 1032, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4042, 4318. As the SAA states, "{o}nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Id.* at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042 (emphasis added).

III. Administrative Proceedings Before Commerce

Commerce initiated the antidumping investigation of certain hot-rolled carbon steel flat products from the Netherlands that is the subject of this litigation on December 4, 2000. *See Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands, et al.*, 65 Fed. Reg. 77568, 77578 (Dep't Commerce Dec. 12, 2000) (initiation). Corus is the sole producer of hot-rolled steel in the Netherlands and, therefore, was the sole company investigated by Commerce. *See Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed. Reg. 22146 (Dep't Commerce May 3, 2001) (prelim. determ.).

Prior to Commerce's final determination in the investigation, Corus filed a case brief challenging Commerce's use of zeroing to calculate the company's weighted average dumping margin. In the issues and decision memorandum adopted as part of its final

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by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

determination, Commerce rejected Corus' argument, determining that zeroing was required by U.S. law. Pet. App. 66a. Commerce determined that Section 771(35)(A) and (B) of the Act "direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales." *Id.* at 67a. Commerce further determined that "{a}t no stage in this process is the amount by which export price or constructed export price exceeds normal value on non-dumped sales permitted to cancel out the dumping margins found on other sales." *Id.*

Commerce also relied on the URAA and the SAA in concluding that the requirements of U.S. law "take precedence over any potentially conflicting obligations under the Uruguay Round Agreements." *Id.* at 68a. Finally, Commerce declined to show any deference to the decisions issued by the WTO panel and Appellate Body on zeroing in *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("*EC - Bed Linen*").

IV. Proceedings on Appeal

The CIT upheld Commerce's margin calculation methodology in its entirety. While the CIT disagreed with Commerce that the statute requires zeroing, it found that Commerce's use of zeroing was based on a reasonable interpretation of the statute. Pet. App. 24a, 30a. In so doing, the CIT stated:

> After all, zeroing is not new. Congress was presumably aware of the practice when it enacted the URAA. Congress could have

> prohibited zeroing if it so chose. Instead, Congress enacted a statute that, at least, arguably encourages zeroing by referring only to dumping margins where the U.S. price exceeds {normal value}.

Id. at 30a (citations omitted).

The CIT further found that the WTO decisions issued in *EC - Bed Linen* "cannot be the basis for striking Commerce's methodology." *Id.* at 29a. It determined that the WTO Anti-Dumping Agreement was "ambiguous" as to whether zeroing was permitted and that WTO decisions are not binding on Commerce or the U.S. courts or a proper basis for Commerce to change its procedures. Given the ambiguity of the Anti-Dumping Agreement and the reasonableness of Commerce's interpretation of the statute, the CIT concluded that it should defer to Commerce's interpretation. *Id.* at 29a-30a.

The U.S. Court of Appeals for the Federal Circuit affirmed. *Id.* at 1a-10a. Specifically, the Federal Circuit relied on its decision in *Timken* in again upholding Commerce's use of zeroing as a reasonable and permissible interpretation of the statute. *Id.* at 6a. In *Timken*, the Federal Circuit had recognized that it was "a close question" as to whether the U.S. statute required zeroing, but held that, "at a minimum," zeroing was a permissible construction of the statute. 354 F.3d at 1341-42.

As it had in *Timken*, the Federal Circuit also considered and rejected Corus' argument in the instant case that Commerce's use of zeroing violated the "fair comparison" requirement of Article 2.4.2 of the WTO Anti-Dumping Agreement. Based on its decision in *Timken*, the

Federal Circuit held that Corus' reliance on the Anti-Dumping Agreement was misplaced because the U.S. statute's "fair comparison" language and explicit scheme for calculating normal value governed. Pet. App. 7a-8a.

Finally, the Federal Circuit rejected Corus' reliance on the WTO Appellate Body's decisions in *EC - Bed Linen*, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan*,[2] and *United States - Final Dumping Determination on Softwood Lumber from Canada* ("*Softwood Lumber*").[3] The Federal Circuit held that such decisions have no binding effect under U.S. law and are owed no deference. In so doing, the Federal Circuit rejected Corus' argument under *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ("*Charming Betsy*") that Commerce's use of zeroing must be overturned in light of these WTO decisions to ensure compliance with the United States' international obligations. As the Court determined,

> {n}either the {the General Agreement on Tariffs and Trade (the "GATT")} nor any enabling international agreement outlining compliance therewith (e.g., the {Anti-Dumping Agreement}) trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress. . . . Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative, an arm

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[2] WT/DS244/AB/R (Dec. 15, 2003).

[3] WT/DS264/AB/R (Aug. 11, 2004).

> of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation. . . .

Pet. App. 8a-9a (citing Sections 123 and 129 of the URAA). The Court also refused to overturn Commerce's use of zeroing because of the foreign policy implications of its determination and the need for the political branches of the government to resolve this issue. *Id.* at 9a-10a.

After the Federal Circuit issued its decision, Corus submitted a petition for rehearing and rehearing en banc and advised the Court of Commerce's implementation of the WTO Appellate Body's decision in *Softwood Lumber* pursuant to Section 129 of the URAA during the course of the Court's consideration of that petition. Nevertheless, the Federal Circuit rejected the petition and thereby once again upheld Commerce's use of zeroing on May 18, 2005. *Id.* at 61a-62a.

REASONS FOR DENYING THE PETITION

The Federal Circuit properly held that Commerce's use of zeroing in the calculation of Corus' aggregate dumping margin in the investigation at issue here represented a reasonable interpretation of the U.S. antidumping statute. The decision of the Federal Circuit does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted and Corus' petition for a writ of certiorari should be denied.

I. Corus' Allegation of a Conflict Between the Federal Circuit's Decision and the Decision of a NAFTA Binational Panel Is Totally Devoid of Merit

Corus contends that the Court should grant certiorari to determine whether Commerce's reasonable interpretation of a U.S. statute must be overturned because it purportedly conflicts with a later decision issued by a NAFTA Binational Panel and the Binational Panel's application of *Charming Betsy*. As demonstrated below, neither the conflict alleged by Corus nor *Charming Betsy* warrant review by this Court.

A. There Is No Conflict Between the Decision Issued by the Federal Circuit and that of the NAFTA Binational Panel that Could Possibly Warrant Review by this Court

Corus argues that there is a "square conflict" between the decision issued by the Federal Circuit in the instant case and the decision issued by a NAFTA Binational Panel in an appeal of the antidumping investigation of softwood lumber from Canada and that this conflict alone warrants review by this Court. Pet. 2, 15, 17, 20. Indeed, Corus contends that "{t}he fact that the Federal Circuit has affirmed an agency interpretation that has been rejected by the only other body with authority to review that interpretation is itself a sufficient reason to justify review of the decision below." *Id.* at 3. Not only is this not a sufficient reason to justify review by this Court, either on its own or in combination with any other factor, Corus' contention is simply absurd.

The NAFTA Binational Panel decision upon which Corus relies was issued in an appeal of the antidumping investigation of softwood lumber from Canada approximately five months after the Federal Circuit's original

decision in the instant case and just under a month after the Federal Circuit's denial of Corus' petition for rehearing and rehearing en banc. Pet. App. 96a. In its decision, the NAFTA Binational Panel considered the effect of the WTO Appellate Body's report in *Softwood Lumber* in which the Appellate Body found against the use of zeroing in the very same antidumping investigation that was the subject of the NAFTA proceeding. *Id.* at 97a. While certainly aware of the decision issued by the Federal Circuit in the instant case in which the Federal Circuit rejected any reliance on the WTO Appellate Body's report in *Softwood Lumber*, the NAFTA Binational Panel proceeded to disregard it. *Id.* at 105a-110a. Instead, the Binational Panel relied on the completion of the implementation process for the Appellate Body's adverse report under Section 129 of the URAA and *Charming Betsy* in holding Commerce's use of zeroing in that case to be inconsistent with the international obligations of the United States. *Id.* at 109a, 116a, 120a. The completion of the Section 129 implementation process included the final decision by the political branches to actually implement the Appellate Body's report in that particular case.

Corus' contention that an alleged conflict between the Federal Circuit's decision in the instant case and the NAFTA Binational Panel's decision in the softwood lumber case warrants review by this Court is devoid of merit. Specifically, Corus' contention must be rejected for two overriding reasons.

First, Corus' argument baselessly equates a NAFTA Binational Panel with the Federal Circuit. Pet. 3, 20. In so doing, Corus flatly disregards and, in fact, fails even to mention the clear provisions of U.S. law and the NAFTA itself as well as case law establishing that Binational Panels

are inferior, subsidiary bodies to the Federal Circuit and are bound by Federal Circuit decisions. NAFTA Article 1904 states with respect to Binational Panel review that

> {a}n involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

NAFTA Art. 1904(2) (emphasis added).

Pursuant to NAFTA Article 1904, NAFTA Binational Panels reviewing antidumping and countervailing duty determinations issued by Commerce have consistently recognized that they are bound by decisions issued by the Federal Circuit. *See, e.g., Alloy Magnesium from Canada*, NAFTA Binational Panel, USA-CDA-2003-1904-02 (Sept. 9, 2005) at 19; *Gray Portland Cement and Clinker from Mexico*, NAFTA Binational Panel, USA-97-1904-02 (Dec. 4, 1998) ("*Mexican Cement*") at 5; *Oil Country Tubular Goods from Mexico*, USA-95-1904-04 (July 31, 1996) at 47 n.175. As the Panel stated in *Mexican Cement*, "Binational panels sitting in the United States are bound by decisions of

the CAFC, and will normally give great weight to precedents issued by the CIT . . . ." *Mexican Cement* at 5 (emphasis added). The NAFTA Binational Panel in the softwood lumber from Canada case was bound by the decision issued by the Federal Circuit in the instant case with respect to the effect of any adverse WTO reports on Commerce's use of zeroing. Accordingly, to the extent that there is any conflict between the decisions issued by the Binational Panel and the Federal Circuit on this issue, it simply shows that the Binational Panel acted in an *ultra vires* fashion in complete disregard of its legal obligations.

Additionally, NAFTA Binational Panels are not only bound by Federal Circuit decisions, but Congress has expressly established that the decisions issued by Binational Panels have no binding effect under U.S. law. 19 U.S.C. § 1516a(b)(3). In accordance with this statutory directive, the CIT has recognized with respect to a NAFTA Binational Panel decision that "{t}he Court by statute is not bound by the final decision and is not required to consider the final decision." *Cinsa, S.A. de C.V. v. United States*, 966 F. Supp. 1230, 1240 (Ct. Int'l Trade 1997). Once again, this shows the inferior, subsidiary position held by NAFTA Binational Panels and that no conflict between a Federal Circuit decision and a Binational Panel decision could possibly warrant this Court's review.

Second, even assuming, *arguendo*, that such a conflict could warrant this Court's review, there simply is no conflict between the NAFTA Binational Panel's decision in the softwood lumber from Canada case and the Federal Circuit's decision in the instant case. Throughout its decision, the NAFTA Binational Panel made clear that it was relying on the fact that the WTO Appellate Body's report in *Softwood Lumber* faulted the use of zeroing in the same

antidumping investigation that was at issue before the Binational Panel and that Commerce had completed the Section 129 process to implement the Appellate Body's report in that very case. Pet. App. 109a ("In *Softwood Lumber*, the Section 123/Section 129 process has run its course."); *id.* at 117a ("{T}he WTO *Softwood Lumber* Decision involves the use of zeroing by the United States in this very investigation and establishes its inconsistency with Article 2.4.2 of the Antidumping Agreement.") (emphasis added); *id.* at 120a ("The {WTO Dispute Settlement Body} decision in *Softwood Lumber* establishes with authority that the resort to zeroing in this investigation is not permitted by the Antidumping Agreement. . . . As such, the application of zeroing by the Department in this investigation conflicts with an international legal obligation of the United States.") (emphasis added).

In fact, the NAFTA Binational Panel explicitly stated that "{w}hen U.S. response to an adverse DSB ruling is under consideration or contest, it would be an intrusion on the decisional authority that Sections 123 and 129 accord to the USTR (in consultation with relevant congressional committees) for a court or a NAFTA Chapter 19 binational panel to find an agency measure unlawful under *Charming Betsy*." *Id.* at 106a. Thus, the Binational Panel clearly recognized that it was addressing a situation that was different and distinguishable from that addressed by the Federal Circuit in the instant case, and there is no conflict between the two decisions that could justify this Court's review.

Corus argues that the outcomes in the softwood lumber from Canada case and the instant case have turned entirely on the "happenstance" or "fortuity" of the forum involved. Pet. 3, 20. To the contrary, the outcomes in the

two cases have turned on one or both of the following two factors: (i) the NAFTA Binational Panel in the softwood lumber case issuing an *ultra vires* decision in complete disregard of its legal obligations and/or (ii) the fact that the Binational Panel was relying on Commerce's implementation of the WTO Appellate Body's adverse decision, including the political branches' final decision to actually implement the Appellate Body's ruling, with respect to the very same case. In either event, there is no basis for review by this Court.

B. The Federal Circuit Properly Upheld Commerce's Determination and Rejected the WTO Decisions Relied Upon by Corus

Corus argues that even beyond the alleged conflict between the Federal Circuit's decision in the instant case and the NAFTA Binational Panel's decision in the softwood lumber case, "{t}he underlying issue of federal law is also an exceedingly important one." Pet. 21. Specifically, Corus asserts that this Court should grant certiorari and overturn Commerce's use of zeroing under *Charming Betsy* on the ground that it is inconsistent with the United States' international obligations. *See id.* at 21-22. Once again, Corus' arguments provide no basis for review by this Court.

Under *Charming Betsy*, U.S. law is to be interpreted, where possible, in a manner that is consistent with U.S. international obligations. *Charming Betsy*, 6 U.S. (2 Cranch) 64; *Timken*, 354 F.3d at 1343. According to Corus, the WTO Appellate Body "has now conclusively ruled that the Department's practice of zeroing negative dumping margins in investigations violates" the "fair comparison" requirement of Article 2.4 of the WTO Anti-Dumping Agreement and the requirement to give full consideration to all comparable export sales in Article 2.4.2 of that Agreement. Pet. 21

(emphasis added). Corus contends that in light of the Appellate Body's ruling in this regard in *Softwood Lumber*, it was error for the Federal Circuit to uphold the use of zeroing in the instant case. Id.

However, in enacting the URAA and adopting the SAA, Congress clearly and unequivocally provided for U.S. law to prevail over any inconsistent provisions of the Uruguay Round Agreements and any obligations established thereunder. In particular, Section 102(a) of the URAA expressly provides that "{n}o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512(a)(1). Moreover, Section 102(a) provides that "{n}othing in this Act shall be construed . . . to limit any authority conferred under any law of the United States . . . unless specifically provided for in this Act." *Id.* § 3512(a)(2). In enacting these provisions, Congress clearly understood that there might be conflicts between U.S. law and the Uruguay Round Agreements and specifically provided for U.S. law to take precedence in those situations.

Furthermore, the SAA expressly provides that WTO panel and Appellate Body reports "will not have any power to change U.S. law or order such a change." SAA at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042. Such reports also have "no binding effect" under U.S. law. Id. at 1032, *reprinted in* 1994 U.S.C.C.A.N. at 4318. Thus, according to the SAA, an adverse WTO decision finding a U.S. law, regulation, or practice to be inconsistent with the provisions of one of the Uruguay Round Agreements cannot require a change in that law, regulation, or practice.

Based on the foregoing, *Charming Betsy* does not and cannot require that Commerce's use of zeroing be overturned due to its alleged inconsistency with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.[4] Any such alleged inconsistency must be resolved in favor of the provisions of U.S. law allowing for the use of zeroing.

In any event, Corus is flatly wrong in asserting that the Appellate Body "conclusively ruled" in *Softwood Lumber* that Commerce's "practice" of zeroing negative dumping margins in investigations is inconsistent with the Anti-Dumping Agreement. The Appellate Body's decision in *Softwood Lumber* did not involve a challenge to Commerce's zeroing practice "as such" (*i.e.*, in general), but only "as applied" in that particular case. *Softwood Lumber* at para. 19.[5] Thus, by its own terms, the Appellate Body's decision in *Softwood Lumber* pertains only to the particular facts in

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[4] Contrary to Corus' contentions, the Appellate Body did not rule in *Softwood Lumber* that Commerce's use of zeroing was inconsistent with the "fair comparison" requirement in Article 2.4 of the Anti-Dumping Agreement. Its decision was based solely on Article 2.4.2 of the Anti-Dumping Agreement. *Softwood Lumber* at para. 117, Pet. App. 135a. To the extent that Corus is relying on the Appellate Body's decision in *EC - Bed Linen* with respect to Article 2.4, that decision did not involve the United States or its zeroing methodology and is, therefore, inapplicable. In addition, Section 773(a) of the Act contains its own "fair comparison" requirement and specifies exactly which adjustments are to be made to normal value and U.S. price to achieve the requisite "fair comparison." *See* 19 U.S.C. § 1677b(a). This provision of U.S. law takes precedence over Article 2.4 of the Anti-Dumping Agreement.

[5] In the WTO dispute settlement system, claims that are "as applied" involve challenges based on the "specific set of facts" in a particular case. They are distinguished from "as such" claims which challenge a WTO Member's practice in general in all cases. *See United States - Sunset Reviews of Antidumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (Nov. 29, 2004) at para. 6 and para. 6 n.22.

that case and not to Commerce's zeroing practice in general. In other words, it does not, in any way, pertain to Corus or any other case and there is no basis to apply it to overturn the use of zeroing in those cases.

Even in the event that a decision is adopted by the WTO that finds Commerce's zeroing practice to be inconsistent with the Anti-Dumping Agreement "as such" or "as applied" to Corus, that decision would have to be implemented in the United States, if at all, pursuant to the elaborate statutory scheme established by Sections 123 and 129 of the URAA.[6] With respect to an "as such" challenge to the practice of zeroing in general, each one of the six steps required by Section 123(g)(1) would have to be taken. 19 U.S.C. § 3533(g)(1). With respect to a challenge to zeroing "as applied" to Corus, Section 129(b) would require extensive consultations throughout the process among Congress, USTR, and Commerce as well as the issuance of a new determination by Commerce and proceedings relating to the consideration of that new determination. *Id.* § 3538(b) Significantly, the Executive Branch and/or Congress could simply decide, at any point during the implementation process under Sections 123 and 129, not to implement an

[6] A WTO panel formed to consider Commerce's zeroing practice both as such and as applied in a number of cases involving the European Communities, including the investigation at issue here, issued its decision finding Commerce's use of zeroing to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement on October 31, 2005. *See United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (Oct. 31, 2005). The panel's decision may be appealed to the WTO Appellate Body within 60 days of its issuance. Even if an adverse decision is ultimately adopted by the WTO in this matter, that decision would still have to be implemented in the United States pursuant to the detailed implementation scheme discussed above. Moreover, the United States may choose not to implement that decision at all.

adverse WTO decision at all. *See id.* §§ 3533(f)(3), 3538(b)(4); SAA at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042. As the SAA expressly recognizes, only the Executive Branch and Congress can decide "whether to implement a WTO panel recommendation and, if so, how to implement it." SAA at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042 (emphasis added).

Accordingly, as the Federal Circuit correctly determined, there is no basis for the courts to take any action with respect to Commerce's use of zeroing in the instant case. If this or another U.S. court were to overturn Commerce's use of zeroing based on *Charming Betsy*, it would thwart Congress' entire statutory scheme for the treatment of the Uruguay Round Agreements and WTO dispute settlement decisions. It would usurp the role of the political branches to determine whether and how to implement WTO decisions, would effectively eliminate policy options that are currently available with respect to Corus and others, and would compromise the United States' position in the ongoing litigation involving this issue at the WTO. Corus' petition for a writ of certiorari should be rejected on this basis as well.

II. There is No Conflict Among the Circuits Over the Proper Application of *Charming Betsy*

Corus next argues that the Federal Circuit's decision below conflicts with the decisions of other circuits over the proper role of *Charming Betsy* in cases involving deference to agency interpretations of ambiguous statutes under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). Pet. 22-23. In addition, Corus makes a number of baseless assertions regarding the significance of this alleged conflict. *See id.* at

25-26. Each of Corus' assertions in this regard is without merit.

A. The Federal Circuit's Decision Is Consistent with that of Other Circuits

Contrary to Corus' assertion, the Federal Circuit's decision in the instant case does not conflict with the decisions of any other circuit regarding the role of *Charming Betsy* in cases involving *Chevron* deference. In fact, despite alleging a purportedly "broader doctrinal conflict" over the proper role of *Charming Betsy* created by the Federal Circuit's decision, Corus cites only a single case - *George E. Warren Corp. v. U.S. Environmental Protection Agency*, 159 F.3d 616 (D.C. Cir. 1998) ("*George E. Warren Corp.*") - as evidence of this conflict. As established below, even the one case cited by Corus presents no conflict with the Federal Circuit's decision in this case.

In *George E. Warren Corp.*, an importer of gasoline challenged amended regulations issued by the Environmental Protection Agency (the "EPA") pursuant to the Clean Air Act. *Id.* at 620. Among other things, the plaintiff challenged the EPA's consideration of an adverse WTO decision in formulating its amended regulations. *Id.* at 623. The D.C. Circuit rejected the plaintiff's claim, holding that nothing in the applicable statute indicated that "Congress intended to preclude the EPA from considering the effects a proposed rule might have upon the . . . treaty obligations of the United States." *Id.* As a result, the Court upheld the EPA's exercise of its discretion in considering the adverse WTO decision as a reasonable interpretation of an ambiguous statute under *Chevron*. *Id.* at 623-24. In other words, the D.C. Circuit applied *Charming Betsy* to permit an agency to consider a WTO decision where the agency determined that such

consideration was appropriate. The Court did not require the agency to comply with or implement an adverse WTO decision. In this manner, the D.C. Circuit applied *Charming Betsy* to reinforce, rather than trump, *Chevron* deference to a reasonable agency interpretation of an ambiguous statute.

The Federal Circuit's decision in the instant case is entirely consistent with *George E. Warren Corp.* Despite Corus' contentions to the contrary, the Federal Circuit's decision did not in any way "deprive{} the Department of discretion to interpret the statute in a manner that does not violate U.S. treaty obligations." Pet. 24. In particular, in addressing the factors to be considered under the fair comparison requirement of the U.S. statute, the Federal Circuit did not even suggest that Commerce was somehow precluded from considering other factors in reaching its decision. Rather, the Federal Circuit simply declined to overturn Commerce's otherwise reasonable interpretation of the statute and thereby force Commerce to implement the WTO Appellate Body's adverse decisions on zeroing based on *Charming Betsy*. *See* Pet. App. 7a-10a. Accordingly, Corus' claims of a conflict between the D.C. Circuit's decision in *George E. Warren Corp.* and the Federal Circuit's decision here have no basis in fact.

Indeed, the consistency between the two circuits' application of *Charming Betsy* is further demonstrated in two other decisions issued by the Federal Circuit. Specifically, in *Federal Mogul Corp. v. United States* ("*Federal Mogul*"), the statute being considered by the Federal Circuit "presented Commerce with a choice between methodologies for calculating dumping margins" and the Court upheld Commerce's selection of the option that was consistent with U.S. international obligations. 63 F.3d 1572, 1581 (Fed. Cir. 1995). Similarly, in *Luigi Bormioli Corp. v. United States*,

the Federal Circuit upheld an interpretive ruling of the U.S. Customs Service that was promulgated to implement a decision of a GATT committee. 304 F.3d 1362, 1368-69 (Fed. Cir. 2002). Significantly, in each of these cases, the Federal Circuit was not acting to mandate implementation of an adverse international decision contrary to the wishes of the Executive Branch and in violation of a designated statutory scheme for implementation. Instead, consistent with the D.C. Circuit's decision in *George E. Warren Corp.*, the Federal Circuit applied *Charming Betsy* in tandem with *Chevron* to accord deference to an agency's exercise of discretion to consider an international decision.

In fact, Corus has not cited a single case in which a court of appeals has reversed an otherwise reasonable agency interpretation of an ambiguous statute under *Charming Betsy* and thereby used *Charming Betsy* to force implementation of an adverse international decision. *See* Pet. 22-24. There is a very simple reason for this - there is no such case.

B. Corus' Discussion Regarding the Importance of the Alleged Conflict Among the Circuits on *Charming Betsy* Is Without Basis

Corus further contends that the purported conflict among the circuits over the proper application of *Charming Betsy* in cases involving *Chevron* deference "is a recurring and indisputably important one" justifying review by this Court. Pet. 24-25. However, Corus' discussion regarding the importance of this issue is simply baseless.

Corus first asserts that the "economic significance" of this issue "is itself enormous." *Id.* at 25. There are two fundamental problems with this assertion, however.

First, Corus has not even attempted to show how this factor is relevant to the issue of whether this case is appropriate for review by the Court. If an issue's "economic significance" were sufficient to warrant review, this Court's docket would be flooded with a multitude of cases qualifying on this basis alone.

Second, Corus' contentions regarding the "economic significance" of this case are based purely on assumptions and estimates that either lack support or, even worse, are demonstrably wrong. *See id.* Among other things, Corus essentially attributes the entire amount of the antidumping and countervailing duties estimated to be collected by the United States over the next 5 to 10 years to the use of zeroing. *See id.* This is simply absurd. Indeed, zeroing is just one of the innumerable factors that enter into the calculation of antidumping duties that are assessed and collected in the United States. It may or may not have an impact on the amount of such duties. Moreover, zeroing is not even used in and, therefore, has no bearing on the calculation of countervailing duties. Accordingly, Corus' assertions regarding the "economic significance" of this case do not comport with the facts and certainly do not warrant this Court's review.

Corus' other argument regarding the significance of this case is that international trade is not the only area in which courts must address the interplay of *Charming Betsy* and *Chevron* and, therefore, this issue is likely to arise in a number of different contexts in the future. *Id.* at 26. In support of this argument, Corus cites three cases in which it claims this issue arose outside the international trade context, including *George E. Warren Corp.* in the D.C. Circuit. *Id.* However, the cases in question either do not address this

issue at all or do not conflict, in any way, with the Federal Circuit's decision in the instant case.[7] In other words, the cases cited by Corus do not offer any basis to justify this Court's review.

III. The Federal Circuit Properly Deferred to Commerce's Determination Based on the Statutory Scheme for Implementation of WTO Decisions and Based on the Foreign Policy Implications of Commerce's Determination

Finally, Corus argues that this Court should review and reverse the Federal Circuit's decision in the instant case because it deprives Corus of its right to judicial review and

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[7] Corus' contention that this issue arose in *Mississippi Poultry Ass'n, Inc. v. Madigan* ("*Mississippi Poultry*") is flatly wrong. Pet. 26. In that case, the 5th Circuit held that the language of the statute at issue was unambiguous, and, therefore, the Court did not confer deference to the agency's interpretation of the statute under *Chevron*. *Mississippi Poultry*, 992 F.2d 1359, 1368 (5th Cir. 1993). The Court also specifically rejected the application of *Charming Betsy*. *Id.* at 1367. Of the remaining two cases cited by Corus, neither conflicts with the Federal Circuit's decision here. As established above, there is no conflict between the Federal Circuit's decision and the decision of the D.C. Circuit in *George E. Warren Corp.* Additionally, there is no conflict between the Federal Circuit's decision and that of the 9th Circuit in *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003) ("*Ali*"), the other case cited by Corus. In *Ali*, the 9th Circuit upheld the district court's decision that the agency's interpretation of the statute was not entitled to deference because it was inconsistent with the agency's policy and regulations. *Id.* at 885. While the 9th Circuit also upheld the district court's reference to international law in reaching its decision, the 9th Circuit found that this reference was "merely as further support" for the construction of the statute that the district court had already adopted and that the international law principles in question were also supported by U.S. domestic law. *Id.* at 885-86. Clearly, there is no conflict between the 9th Circuit's decision in *Ali* and the Federal Circuit's decision in the instant case, and Corus has alleged none.

denigrates or dilutes Congress' authority as the primary voice of the United States on matters of foreign commerce. *See id.* at 27-30. Once again, there simply is no basis for either of these arguments.

Corus contends as an initial matter that the Federal Circuit's decision deprives it of its right to judicial review of Commerce's action. *Id.* at 27-28. Specifically, Corus argues that "{b}y deeming the foreign policy implications of antidumping orders to fall within the exclusive province of the political branches, . . . the Federal Circuit improperly conferred unfettered discretion on the Department to implement an ambiguous provision of the Tariff Act in whatever manner the agency sees fit." *Id.* at 28. As purported support for this contention, Corus cites this Court's decisions in *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) ("*Traynor*"), and *Bowen v. Michigan Acad. Of Family Physicians*, 476 U.S. 667, 671 (1986) ("*Bowen*"). *Id.* at 27-28. However, neither of the cited cases provides any support for Corus' argument.

Indeed, in both of the cases in question, this Court simply considered and rejected arguments by the government that a statute completely barred judicial review of the challenged administrative actions. *Traynor*, 485 U.S. at 541-42, 545; *Bowen*, 476 U.S. at 669-73. The Federal Circuit's decision here did not, in any way, bar judicial review of Commerce's actions in calculating Corus' dumping margin. To the contrary, Corus still had the benefit of full judicial review of whether Commerce's actions satisfied the requirements of U.S. law and represented a reasonable interpretation of the antidumping statute. The Federal Circuit simply held that the decisions issued by the WTO Appellate Body on zeroing were owed no deference in

resolving this issue and could not serve as a basis for overturning Commerce's determination. *Pet. App.* 9a-10a.

Corus' argument regarding the dilution of Congress' authority as the primary voice of the United States on matters of foreign commerce is also without merit. In making this argument, Corus ignores the fact that it is the Executive Branch, rather than Congress, that is the "sole organ" of the United States in matters of foreign affairs. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Indeed, the courts have steadfastly avoided taking any action that would impinge on or disturb the Executive Branch's plenary and exclusive power in this area. *See id.*; *SNR Roulements v. United States*, 341 F. Supp. 2d 1334, 1343-44 (Ct. Int'l Trade 2004) ("*SNR Roulements*").

This principle has been repeatedly applied in matters involving the treatment of adverse decisions issued by the WTO. For example, in *SNR Roulements*, the CIT upheld Commerce's use of a methodology that had been found by the WTO Appellate Body to be inconsistent with the Anti-Dumping Agreement, expressing that it was "mindful of the prerogative of the Executive Branch - most importantly, the Office of the U.S. Trade Representative - in dealing with the WTO in its diplomatic and policymaking roles." 341 F. Supp. 2d at 1343-44. Moreover, the courts have consistently accorded substantial deference to Commerce's interpretation of the antidumping statutes based on "the foreign policy repercussions of a dumping determination." *Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983); *see also Federal Mogul*, 63 F.3d at 1582 (same); *Daewoo Electronics Co., Ltd. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993) (same); *Melamine Chems., Inc. v. United States*, 732 F.2d 924, 930 (Fed. Cir. 1984) (same).

But the Executive Branch's authority here is based on more than just its general power in matters of foreign affairs. As the Federal Circuit correctly recognized in its decision below, Congress has created a statutory framework specifically authorizing the Executive Branch, in consultation with Congress, to determine whether to implement WTO decisions and, if so, the extent of implementation. Pet App. 9a-10a. Specifically, by virtue of Sections 123 and 129 of the URAA, Congress has created a detailed statutory scheme pursuant to which WTO decisions do not have an automatic and binding effect on U.S. law and do not trump determinations of the Executive Branch in defining U.S. policy and practices. Under that statutory scheme, the Executive Branch, acting through USTR and in consultation with Congress, must expressly decide whether and, if so, how to implement WTO decisions. *See* 19 U.S.C. §§ 3533(f), 3538(b).

Corus treats the steps required by Sections 123 and 129 of the URAA for the implementation of an adverse WTO decision as a perfunctory, pro forma exercise. Pet. 28-29. However, this argument ignores the critical nature of each of the actions and decisions necessitated by the statutory scheme and the fact that the Executive Branch and/or Congress may decide at any time under that scheme not to implement a WTO decision at all. *See* 19 U.S.C. §§ 3533(f)(3), 3538(b)(4); SAA at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042. Were this Court to require Commerce's determination here to comply with the WTO Appellate Body's decisions on zeroing, it would, in effect, implement such decisions in contravention of the statutory scheme established under Sections 123 and 129 and would eliminate the various policy options available to the Executive Branch for responding to adverse WTO decisions.

Contrary to Corus' assertions, the Federal Circuit's decision in the instant case does not denigrate or dilute Congress' authority. Rather, it fulfills Congress' mandate and gives effect to Congress' role both by enforcing the statutory scheme established by Congress for the implementation of WTO decisions and by recognizing the need for Congressional involvement through that scheme. In fact, it is Corus, not the Federal Circuit, that would divest the political branches of their voice and would improperly exalt the supremacy of the courts in matters of foreign commerce by eviscerating the statutory scheme that Congress has established and allowing for judicial implementation of WTO rulings. There is no conceivable basis for Corus' argument.

CONCLUSION

For all of the reasons set forth above, Corus' petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 6, 2005

APPENDIX

19 U.S.C. § 1516a. Judicial review in countervailing duty and antidumping duty proceedings

* * * *

(b) Standards of review

* * * *

(3) Effect of decisions by NAFTA or United States-Canada binational panels

In making a decision in any action brought under subsection (a) of this section, a court of the United States is not bound by, but may take into consideration, a final decision of a binational panel or extraordinary challenge committee convened pursuant to article 1904 of the NAFTA or of the Agreement.

* * * *

19 U.S.C. § 1673d. Final determinations

* * * *

(c) Effect of final determinations

(1) Effect of affirmative determination by the administering authority

If the determination of the administering authority under subsection (a) of this section is affirmative, then --

* * * *

(B)(i) the administering authority shall --

(I) determine the estimated weighted average dumping margin for each exporter and producer individually investigated, and

(II) determine, in accordance with paragraph (5), the estimated all-others rate for all exporters and producers not individually investigated, and

(ii) the administering authority shall order the posting of a cash deposit,

bond, or other security, as the administering authority deems appropriate, for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, whichever is applicable, and

(C) in cases where the preliminary determination by the administering authority under section 1673b(b) of this title was negative, the administering authority shall order the suspension of liquidation under section 1673b(d)(2) of this title.

* * * *

19 U.S.C. § 1677a. Export price and constructed export price

(a) Export price

The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.

* * * *

19 U.S.C. § 3512. Relationship of agreements to United States law and State law

(a) Relationship of agreements to United States law

(1) United States law to prevail in conflict

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

(2) Construction

Nothing in this Act shall be construed --

(A) to amend or modify any law of the United States, including any law relating to --

(i) the protection of human, animal, or plant life or health,

(ii) the protection of the environment, or

(iii) worker safety, or

(B) to limit any authority conferred under any law of the United States, including section 2411 of this title,

unless specifically provided for in this Act.

* * * *

(d) Statement of administrative action

The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

19 U.S.C. § 3533. Dispute settlement panels and procedures

* * * *

(f) Actions upon circulation of reports

Promptly after the circulation of a report of a panel or of the Appellate Body to WTO members in a proceeding described in subsection (d) of this section, the Trade Representative shall --

(1) notify the appropriate congressional committees of the report;

(2) in the case of a report of a panel, consult with the appropriate congressional committees concerning the nature of any appeal that may be taken of the report; and

(3) if the report is adverse to the United States, consult with the appropriate congressional committees concerning whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation.

* * * *

THE URUGUAY ROUND AGREEMENTS ACT
STATEMENT OF ADMINISTRATIVE ACTION

* * * *

[Page 659]

AGREEMENT ESTABLISHING
THE WORLD TRADE ORGANIZATION

A. SUMMARY OF PROVISIONS

The Agreement Establishing the World Trade Organization (WTO Agreement) creates a permanent forum for member governments to address issues affecting their multilateral trade relations as well as to supervise the implementation of the trade agreements negotiated in the Uruguay Round. The new World Trade Organization (WTO) will operate in much the same manner as the General Agreement on Tariffs and Trade, which it will replace, while overseeing a wider variety of trade agreements and benefiting from a number of improved decision-making procedures.

1. U.S. Sovereignty

U.S. sovereignty is fully protected under the WTO Agreement. The WTO will continue the longstanding GATT practice of making decisions by consensus. The last policy decision made by

vote under the GATT -- other than approving a waiver or a country's accession to the GATT -- was in 1959. However, should a vote be taken on a matter in the WTO, the improved procedures written into the WTO Agreement will ensure that there can be no change in U.S. substantive rights and obligations without the agreement of the United States.

The WTO will have no power to change U.S. law. If there is a conflict between U.S. law and any of the Uruguay Round agreements, section 102(a) of the implementing bill makes clear that U.S. law will take precedence:

> "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."

Moreover, as explained in greater detail in this Statement in connection with the Dispute Settlement Understanding, WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.

* * * *

North American Free Trade Agreement

Part Seven: Administrative and Institutional Provisions

Chapter Nineteen: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters

* * * *

Article 1904: Review of Final Antidumping and Countervailing Duty Determinations

* * * *

2. An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority. Solely for the purposes of the panel

review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.

* * * *

2005
OFFICE OF THE CLERK

No. 05-361

In the Supreme Court of the United States

CORUS STAAL BV AND CORUS STEEL USA, INC.,
PETITIONERS

v.

DEPARTMENT OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Department of Commerce's longstanding, and admittedly reasonable, construction of a domestic antidumping statute, notwithstanding World Trade Organization and North American Free Trade Agreement panel reports interpreting a purportedly analogous provision in an international trade agreement, where Congress has specifically provided that international panel reports have no legal effect with respect to federal law except as implemented by the Executive Branch or Congress.

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In the Supreme Court of the United States

No. 05-364

CORUS STAAL BV AND CORUS STEEL USA, INC.,
PETITIONERS

v.

DEPARTMENT OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 395 F.3d 1343. The judgment and opinion of the Court of International Trade (Pet. App. 11a, 12a-46a) are reported at 283 F. Supp. 2d 1357.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2005. A petition for rehearing was denied on May 18, 2005 (Pet. App. 61a-62a). On July 28, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 15, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Anti-Dumping Act, 1921, 19 U.S.C. 1673 *et seq.*, and the Tariff Act of 1930, 19 U.S.C. 1001 *et seq.*, have long provided for the imposition of antidumping duties where "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673.[1] If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an antidumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i).

In assessing whether merchandise is being "dumped" in the United States, the Department of Commerce adjusts both the "normal value" and the "export price" to achieve a "fair comparison" between the two. 19 U.S.C. 1677b(a). For example, the statute calls for subtracting transportation costs to the United States, if those are included in the export price, and eliminating the effect of import duties applied by the exporting country on imported parts. 19 U.S.C. 1677a(c), 1677b(a)(6) and (7).[2]

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[1] This language was originally adopted in the Anti-Dumping Act, 1921, ch. 14, § 201, 42 Stat. 11, which, prior to 1979, was codified at 19 U.S.C. 160 *et seq.* (1976). It was subsequently reenacted in 1979 as Title VII of the Tariff Act of 1930, ch. 497, § 1, 46 Stat. 590, as part of a more general revision of customs laws relating to the General Agreement on Tariffs and Trade. See Trade Agreements Act of 1979, Pub. L. No. 96-39, Tit. I, § 101, 93 Stat. 162 (19 U.S.C. 1673 *et seq.*).

[2] When, as in this case, there is a third-party intermediary, such as a broker or an affiliate of the seller, the statute calls for the Department of Commerce to use a "constructed export price," which entails further

If the Department of Commerce makes a final determination that merchandise is being sold in the United States at less than its fair value, the Department is required to determine an "estimated weighted average dumping margin" for each exporter and producer and an "all-others" rate for those not individually investigated. 19 U.S.C. 1673d(c)(1)(B). Exporters and producers must then post a cash deposit or security for each entry in an amount based on the appropriate dumping margin. *Ibid.*

The statute specifies that the "dumping margin" is "the amount by which the normal value exceeds the export price," and that the "weighted average dumping margin" is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices" for that exporter or producer. 19 U.S.C. 1677(35)(A) and (B).

Under the Department of Commerce's long-standing construction of the statute, there is a "dumping margin" only when the normal value at which a product is sold in the exporting country "exceeds the export price" to the United States by a positive value. 19 U.S.C. 1677(35)(A).[3] In other words, if the export price is the same as or higher than the normal value, there is no, or zero, "dumping margin," and thus nothing to include when summing the "dumping margins" that the statute

---

adjustment, including the elimination of commissions. 19 U.S.C. 1677a(b) and (d)(1)(A). Because the distinction between "export price" and "constructed export price" is irrelevant to the issues presented here, we will, for the sake of convenience, refer simply to "export price."

[3] Under certain circumstances not relevant here, normal value may be calculated using third country sales, constructed value, or factors of production. 19 U.S.C. 1677b(a)(1)(C), (4) and (c)(3).

specifies as the numerator in the "weighted average dumping margin" ratio. 19 U.S.C. 1677(35)(B).[4]

Once an affirmative dumping determination has been made, the statute provides for an administrative review of the antidumping duty to be conducted on an annual basis, upon request. 19 U.S.C. 1675. The dumping margin that is determined during the course of this review then becomes the basis for estimated antidumping duties that are collected on new entries of merchandise and for the assessment rates for importers. 19 U.S.C. 1675(a)(2)(A) and (C).

2. In 1994, the United States became a signatory to several Executive agreements, known collectively as the Uruguay Round Agreements (the Agreements), one of which is the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Agreement), *reprinted in* H.R. Doc. No. 316, 103d Cong., 2d Sess. Vol. 1, at 1453 (1994). Congress enacted the Uruguay Round Agreements Act (URAA), 19 U.S.C. 3501 *et seq.*, to implement those Agreements. 19 U.S.C. 3511. In the URAA, Congress established detailed rules regarding the relationship between the Agreements and domestic law (including domestic trade laws), as well as an elaborate process for dealing with disputes concerning the consistency of domestic laws with the Agreements.

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[4] The denominator of the ratio—the "aggregate export prices" of the exporter's sales—is calculated by summing the export prices of all sales, including those that take place at or above the normal value. 19 U.S.C. 1677(35)(B). The inclusion of sales at and above the normal value in the denominator has the effect of lowering the weighted average dumping margin, and hence the antidumping duty, compared to what it would be if the denominator were derived by summing only the export prices for sales in which dumping occurred.

As a general matter, Congress emphasized the continuing primacy of federal law in the event of any conflict between it and the Agreements. As such, "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. 3512(a)(1). Congress further stated, with respect to the interaction of the URAA and federal law, that "[n]othing in this Act shall be construed * * * to limit any authority conferred under any law of the United States * * * unless specifically provided for in this Act." 19 U.S.C. 3512(a)(2).

The URAA also clarifies that neither the Uruguay Round Agreements nor the fact of Congress's approval of the Agreements creates privately enforceable rights or provides a basis for challenging Executive Branch action:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

Because the URAA specifies that the Agreements create no privately enforceable rights and cannot provide the basis for challenging administrative actions, disputes with respect to the United States' compliance with its obligations under the Agreements can be

brought only through the mechanisms provided in the Agreements themselves. See The Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), 33 I.L.M. 1226 (1994); 19 U.S.C. 3511(d)(16). Those procedures include bringing disputes before a World Trade Organization (WTO) panel, the findings of which can be appealed to the WTO Appellate Body. See Dispute Settlement Understanding, Arts. 6, 17, 33 I.L.M. at 1230, 1236. Private entities may not initiate a proceeding before a WTO panel; rather, only a WTO Member may invoke the WTO dispute settlement procedures. *Id.* Art. 2.1, 33 I.L.M. at 1226.

Congress was very specific, when it enacted the URAA, about the manner in which the United States would respond to reports issued by WTO panels or the WTO Appellate Body. The Statement of Administrative Action (SAA) approved by Congress in connection with the passage of the URAA, see 19 U.S.C. 3511(a), 3512(d), makes clear that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change." H.R. Doc. No. 316, *supra*, at 659. Nor may a party ask a court to direct implementation of a WTO Report. To the contrary, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Ibid.*

In the URAA, Congress established two methods for implementing certain types of WTO dispute settlement reports. One method deals with the amendment, rescission, or modification of an agency regulation or practice that a WTO report indicates is inconsistent with the Uruguay Round Agreements, including the Antidumping Agreement. Section 3533(g) specifies that

the regulation or practice that the WTO body has found inconsistent with the Agreements "*may not* be amended, rescinded, or otherwise modified * * * unless and until" the elaborate procedures set forward in the subsection have been complied with. 19 U.S.C. 3533(g)(1) (emphasis added). The United States Trade Representative (USTR) is required to consult with the appropriate congressional committees, agency or department head, and private sector advisory committees, and to provide an opportunity for public comment, before determining whether and how to implement a WTO report. 19 U.S.C. 3533(g)(1)(A)-(E). No implementation may become effective until the relevant congressional committees have been allowed a specified period of time to indicate their agreement or disagreement with the proposed implementation. 19 U.S.C. 3533(g)(2) and (3).

A second procedure for implementing a WTO report in domestic law is set forth in 19 U.S.C. 3538. Section 3538 is narrower in scope than Section 3533(g), and applies, *inter alia*, to the situation in which a WTO dispute settlement report indicates that an action by the Department of Commerce in an antidumping proceeding was not in conformity with the United States' obligations under the Uruguay Round Antidumping Agreement. 19 U.S.C. 3538(b)(1).[5] Like the statutory procedure under

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[5] Section 3538(b)(1) also applies when an action by the Department of Commerce in a countervailing duty proceeding is found to be inconsistent with the Uruguay Round Agreement on Subsidies and Countervailing Measures ("Subsidies Agreement"), *reprinted in* H.R. Doc. No. 316, *supra*, at 1533. Section 3538(a)(1) applies when an action by the United States International Trade Commission is found to be inconsistent with the Antidumping Agreement, the Subsidies Agreement, or the Uruguay Round Agreement on Safeguards, *reprinted in* H.R. Doc. No. 316, *supra*, at 1577.

Section 3533, Section 3538 provides for consultation between USTR and relevant stakeholders before USTR makes a determination whether and how to implement the WTO body report. Section 3538 specifies that "*[b]efore* the administering body implements any determination * * * the Trade Representative shall consult with the administering authority and the congressional committees," 19 U.S.C. 3538(b)(3) (emphasis added), and the administering authority "shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing," 19 U.S.C. 3538(d). Upon completion of this process, USTR "*may* * * * direct the Department of Commerce to implement, in whole or in part," a new determination consistent with the WTO body's findings. 19 U.S.C. 3538(b)(4) (emphasis added).

If USTR requests that the Department of Commerce issue a new determination and orders Commerce to implement it, the new determination applies only to "unliquidated entries of the subject merchandise" that are entered or withdrawn from warehouse for consumption on or after the date the USTR directs the Department of Commerce to implement the new decision. 19 U.S.C. 3538(c)(1).

In the URAA, Congress made clear that the USTR could, after consultation, choose *not* to alter the administrative action that is the subject of an adverse WTO report, and may instead offer the complaining party trade compensation in some other form. 19 U.S.C. 3538(b)(4) (USTR "may" direct implementation of new determination consistent with WTO report "in whole or in part"); H.R. Doc. No. 316, *supra*, at 1015; 19 U.S.C. 3533(f)(3) (requiring USTR to consult with the appropriate congressional committees "concerning *whether to imple-*

ment the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation") (emphasis added). Importantly, the political branches could decide not to implement the new determination, but instead to compensate our trading partners in some other way. See Dispute Settlement Understanding, Arts. 3.7, 22, 33 I.L.M. at 1227, 1239; H.R. Doc. No. 316, *supra*, at 1016.

3. Petitioners are a Dutch corporation, Corus Staal BV, and its wholly-owned American subsidiary, Corus Staal, USA, Inc., which manufacture and export steel products to the United States. In 2001, the Department of Commerce determined that hot-rolled steel from the Netherlands was being sold, or likely to be sold, in the United States at less than fair value. The Department calculated the weighted-average dumping margin by aggregating all model-specific dumping margins, assigning a dumping margin of zero to those comparisons in which the United States price exceeded normal value. *Hot-Rolled Steel Products from China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine*, 66 Fed. Reg. 57,482 (2001), adopting the *Issues and Decision Memorandum for the Antidumping Investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Notice of Final Determination of Sales at Less Than Fair Value* (Oct. 3, 2001). The antidumping duty order established a 2.59% weighted average dumping margin with respect to petitioners' exports. *Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed. Reg. 59,565 (2001).

4. Petitioners filed an action in the Court of International Trade challenging the Department's methodology

for calculating the weighted average dumping margin. The court held that the Department had reasonably interpreted the relevant statute, and rejected petitioners' contention that the Department's interpretation was unreasonable because it allegedly conflicted with a report adopted by the WTO Dispute Settlement Body (DSB) interpreting the Antidumping Agreement. After noting that the Department's methodology has been repeatedly sustained by the Court of International Trade and the Federal Circuit, and that WTO panel reports are not binding even within the WTO, the court concluded that a panel report, even if adverse to the United States' interests before the WTO, did not render the Department's statutory interpretation unreasonable. Pet. App. 29a.

5. The Federal Circuit affirmed. Pet. App. 1a-10a. The court held that the Department of Commerce's interpretation of the relevant statute, which the court agreed was ambiguous, was reasonable. *Id.* at 5a-6a. Noting that WTO reports are not binding upon the United States, let alone United States domestic courts, the court of appeals observed that, pursuant to statute, "[n]o provision of any of the Uruguay Round Agreements * * * that is inconsistent with any law of the United States shall have any effect." *Id.* at 8a (quoting 19 U.S.C. 3512(a)). In particular, the court of appeals noted that Congress has established a procedure by which the Executive Branch will, "in consultation with various congressional and executive bodies and agencies, * * * determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation." *Id.* at 9a. The court refused to overturn the Department of Commerce's interpretation of an ambiguous statute "based on any ruling by the

WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme." *Id.* at 10a.

ARGUMENT

The court of appeals correctly held that the Department of Commerce's calculation of aggregate dumping margins in the investigation at issue in this case was reasonable. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. Petitioners contend (Pet. 2-4, 14-20) that the Court should grant certiorari to determine whether an agency's otherwise reasonable interpretation of a statute, which would normally be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), must be overturned in light of *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), on the ground that the challenged agency practice is allegedly inconsistent with an international body's interpretation of an Executive agreement to which the United States is a party. Petitioners rely (Pet. 3) on this Court's observation in *Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," 6 U.S. (2 Cranch) at 118. According to petitioners, the *Charming Betsy* canon establishes broad judicial authority to compel the Executive Branch to conform its implementation of domestic law to principles of international law. For example, petitioners urge that "the *Charming Betsy* rule necessarily excludes from the range of otherwise reasonable interpretations" those that have been held by an interna-

tional body to violate an international obligation of the United States, even when the agency's interpretation has been upheld repeatedly under *Chevron*. Pet. 22. See Pet. 3 ("where, as here, a Department interpretation [has been held by a WTO body to be] inconsistent with U.S. treaty obligations, the *Charming Besty* doctrine renders that interpretation unreasonable" and no longer entitled to *Chevron* deference).

We note at the outset that neither *Charming Betsy* nor any other decision of this Court applying that precedent stands for the broad principle advocated by petitioners. *Charming Betsy* itself dealt with the question whether a domestic statute prohibiting trade by Americans with France should be construed to apply to an American ship that had been purchased by a citizen of Denmark, a country that was neutral with respect to the hostilities between the United States and France. 6 U.S. (2 Cranch) at 115-116. Thus, the question specifically addressed by the Court was whether the statute adopted by Congress should "be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." *Id.* at 118.

This Court's subsequent cases applying *Charming Betsy* have likewise involved avoidance of "unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) (application of antitrust statute to conduct with adverse foreign effect). See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (application of employment discrimination statute to bases in foreign lands that were the subject of Executive agreements with the host governments); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22

(1963) (application of National Labor Relations Act to foreign-flag vessels); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (application of Jones Act in maritime cases); see generally *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 814-815, 817 (1993) (Scalia, J., dissenting) (describing principle as one of "prescriptive comity," that "Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe").

This case is not a proper vehicle for considering whether the *Charming Betsy* canon should be extended in the manner advocated by petitioners. That canon, whatever its proper scope, has no application when, as here, Congress has unambiguously specified that alleged conflicts between a domestic agency action and the relevant international agreements are to be resolved through consultation between the Executive and Legislative Branches, and not through litigation in domestic courts.

2. Congress has expressly precluded attempts, such as petitioners', to use the courts of the United States to compel the Department of Commerce to act in conformity with the Uruguay Round Agreements. Section 3512(c)(1)(B) specifically provides that "[n]o person * * * may challenge, in any action brought under any provision of law, any action or inaction by any department * * * on the ground that such action or inaction is inconsistent with [one of the Uruguay Round Agreements]." 19 U.S.C. 3512(c)(1)(B). Petitioners' challenge falls squarely into that forbidden category; they claim (Pet. 21) that "the Department's practice of zeroing negative dumping margins in investigations violates the[] requirements" of the Antidumping Agreement, and that "[t]his treaty violation warrants plenary review and reversal of

the decision below." See *id.* at 15 (characterizing the issue presented as "whether the Department's interpretation ran afoul of U.S. treaty obligations").[6]

In apparent recognition that Section 3512(c) bars a challenge based directly upon an alleged inconsistency between the Department's determination and the Antidumping Agreement, petitioners attempt to characterize their arguments as arising out of a "conflict over the proper interpretation of the statutory definition of the fundamental term 'dumping margin' in 19 U.S.C. § 1677(35)(A)." Pet. 14. Tellingly, however, petitioners make no argument that the Department of Commerce's practice is inconsistent with the language of the statute or otherwise inappropriate, apart from their claim that the Department's view is inconsistent with the opinions of various WTO or binational panel reports.[7]

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[6] We note that, contrary to petitioners' characterization, the Uruguay Round Agreements are not "treaties," but, rather, Executive agreements that have been approved by Congress and implemented in federal law through implementing legislation. See generally 19 U.S.C. 2902, 2903, 3511(a), 3512.

[7] The Federal Circuit has previously recognized the reasonableness of the Department of Commerce's construction of the statute, which has been upheld repeatedly over the past twenty years. See *Timken Co.* v. *United States*, 354 F.3d 1334, 1343 (Fed. Cir.), cert. denied, 125 S. Ct. 412 (2004); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH* v. *United States*, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade 1996); *Serampore Indus. Pvt. Ltd.* v. *Department of Commerce*, 675 F. Supp. 1354, 1360-1361 (Ct. Int'l Trade 1987). As the Court of International Trade has noted, "[t]he practice of considering negative margins as zero ensures that sales made at less than fair value on a portion of a company's product line to the United States market are not negated by more profitable sales." *Serampore*, 675 F. Supp. at 1360. In other words, "profitable sales" are not allowed "to 'mask' sales at less than fair value." *Timken*, 354 F.3d at 1343.

As the court of appeals correctly held, Congress has specified a process for resolving disputes over the United States' compliance with its obligations under the Uruguay Round Agreements, a process that involves international dispute resolution mechanisms and, following the completion of that process, a determination by the political branches of this Nation's government whether and how to implement the international body's findings. Petitioners seek to circumvent that process by invoking the authority of the federal courts in an effort to obtain a remedy that Congress has expressly made unavailable.

As previously noted, see p. 6, *supra*, only a WTO Member, not a private party, may initiate proceedings under the Dispute Settlement Understanding. The European Communities have, in fact, initiated a dispute settlement proceeding before a WTO panel that encompasses, among other things, the Department of Commerce's antidumping determination with respect to petitioners' steel products. That proceeding is still ongoing.

Even assuming that petitioners' view of the Antidumping Agreement's provisions is upheld through the WTO process, the Department of Commerce will not necessarily need to amend the antidumping determination regarding petitioners' products. As the court of appeals correctly observed, the United States need not implement an adverse WTO report. Pet. App. 9a. Congress has specifically provided, and the Dispute Settlement Understanding similarly recognizes, that a WTO Member possesses discretion to decide whether and how to implement a WTO report that finds that the Member acted inconsistently with its WTO obligations. Instead of implementing a WTO report, a Member may choose to offer compensation or other trade concessions to the

Member that brought the WTO proceeding. See Dispute Settlement Understanding, Arts. 3.7, 22, 33 I.L.M. at 1227, 1239; 19 U.S.C. 3538(a)(6) and (b)(4); H.R. Doc. No. 316, *supra*, at 1016.

The decision whether to implement a WTO report "in whole or in part," 19 U.S.C. 3538(b)(4), would be made by USTR after completing the statutorily required process for gathering input from congressional, administrative, and private sector stakeholders, 19 U.S.C. 3538(b)(1)-(3) and (d). Moreover, even assuming that USTR directs the Department of Commerce to issue a new determination consistent with petitioners' understanding of the Antidumping Agreement, Congress has specified that the new determination would have only prospective effect "with respect to unliquidated entries of the subject merchandise * * * that are entered, or withdrawn from the warehouse, for consumption on or after * * * the date on which the Trade Representative directs the [Department] to implement that determination." 19 U.S.C. 3538(c)(1)(B). Thus, petitioners seek relief—recovery of duties already paid (Pet. 18)—that is more generous than the remedy provided by Congress under the applicable statutory framework.

Contrary to petitioners' assertion (Pet. 30), the court of appeals' recognition of the primacy of this statutory scheme does not strip Congress of its "voice" in international commerce. Rather, Congress has spoken clearly and unambiguously by providing that only the political branches shall have the authority to determine whether and how to respond to an adverse WTO report. The statute is also clear that, to the extent that there is a conflict between federal law and the Uruguay Round Agreements, federal law must prevail. Indeed, it is petitioners' approach that, if implemented, would strip Con-

gress and the Executive Branch of the powers that Congress intended the two branches to retain in the international trade arena.

Contrary to petitioners' characterization, the court of appeals did not hold that Sections 3533(g) and 3538 "foreclose judicial review of a claim that the Department has improperly interpreted an ambiguous provision of the Tariff Act." Pet. 28. Rather, the court of appeals considered and rejected on the merits petitioners' arguments that the Department of Commerce had adopted an unreasonable and impermissible interpretation of the statutory requirements to make a "fair comparison * * * between the export price * * * and normal value," Pet. App. 7a n.5 (quoting 19 U.S.C. 1677b(a)) , and to use a "weighted average" in doing so, *id.* at 5a (quoting 19 U.S.C. 1677f-a(d)(1)(A)(i)). To the extent that, in ruling on the merits of petitioners' statutory arguments, the court of appeals refused to give determinative weight to the decisions of WTO bodies construing provisions of the Antidumping Agreement, the court of appeals was simply giving effect to Congress's directives that the decision whether and how to implement a WTO ruling is for the political branches, 19 U.S.C. 3538, and that "[n]o person * * * may challenge, in any action brought under any provision of law, any action or inaction by any department * * * on the ground that such action or inaction is inconsistent with [one of the Uruguay Round Agreements]," 19 U.S.C. 3512(c)(1)(B).

3. The same arguments addressed in the preceding section were previously advanced in an unsuccessful petition for a writ of certiorari seeking review of *Timken Co.* v. *United States*, 354 F.3d 1334 (Fed. Cir.), cert. denied, 125 S. Ct. 412 (2004) (No. 04-87). Petitioners urge that certiorari is appropriate now in light of post-

Timken developments, in particular the development of a purported conflict between the holdings of the Federal Circuit and the recent ruling of a binational panel convened under the North American Free Trade Agreement (NAFTA), Dec. 17, 1992, United States-Canada-Mexico, 32 I.L.M. 289 (entered into force Jan. 1, 1994). See Pet. 16-17 (citing *Certain Softwood Lumber Products from Canada* (*Softwood Lumber*), Secretarial File No. USA-CDA-2002-1904-02 (June 9, 2005)).

Petitioners' reliance on a NAFTA arbitral decision is misplaced. Congress has made the option of binational panels available only with respect to imports covered by NAFTA, *i.e.*, merchandise from Canada or Mexico. See 19 U.S.C. 1516a(g), 3434(c).[8] In particular, challenges like that raised by petitioners in this case, whose products are imported from the Netherlands, are not subject to the NAFTA arbitration process. Thus, petitioners' claim of a "conflict" is based on a decision in an arbitration process to which they are not entitled.

Moreover, petitioners' alleged "conflict" is illusory. Pursuant to the terms of NAFTA, decisions of NAFTA panels are binding *only* with respect to the particular matter between the parties and before the NAFTA panel, and have no precedential effect. NAFTA, Art.

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[8] In a proceeding involving merchandise from Canada or Mexico, a party wishing to challenge either the Department of Commerce's initial determination or the results of an administrative review may do so in one of two ways. First, it may obtain review in the United States Court of International Trade. 19 U.S.C. 1516a(a)(1). Second, at the request of either party, review of the Department's determination may be had before a binational panel convened pursuant to Chapter 19 of NAFTA. 19 U.S.C. 1516a(g)(2). If a binational panel is requested, its authority is exclusive, with certain exceptions not relevant here. 19 U.S.C. 1516a(g)(2)-(4).

1904(9), 32 I.L.M. at 683. Congress has made clear that "a court of the United States is not bound by but may take into consideration, a final decision of a binational panel or extraordinary challenge committee convened pursuant to article 1904 of the NAFTA." 19 U.S.C. 1516a(b)(3). As the legislative history emphasizes, "[t]he intent of this provision is to make clear that a panel or committee decision is binding only with respect to the particular matter before that panel and does not constitute binding precedent on U.S. courts *or other binational panels*." North American Free Trade Agreement Implementation Act, H.R. Rep. No. 361, 103d Cong., 2d Sess., Pt. 1, at 83 (1993) (emphasis added). See H.R. Doc. No. 316, *supra*, at 926 (noting, in connection with adoption of the URAA, that a United States-Canada binational "panel decision would not be binding precedent in future cases"). Therefore, the NAFTA panel decision in *Softwood Lumber* can have no effect upon this case, which involves different parties, a different product, and a different investigation.

In addition, NAFTA panel decisions cannot create any "conflict" with the Federal Circuit because NAFTA panels are subject to Federal Circuit precedent. A NAFTA panel functions as a trial court, "replace[ing]" the Court of International Trade for purposes of reviewing the antidumping duty, and is required to apply "judicial precedents to the extent that a court of the importing Party would rely on such materials," which, of course, include Federal Circuit precedent. NAFTA, Art. 1904(2), 32 I.L.M. at 683. Thus, petitioners' argument that the Court should grant review because the court of appeals' decision "conflicts with a Binational Panel decision rendered less than a month after the Federal Circuit denied rehearing," Pet. 15, is akin to

urging certiorari based upon a purported "conflict" between a Second Circuit opinion and a later decision of the United States District Court for the Southern District of New York. Such an assertion, if true, means only that the lower tribunal has failed to follow binding precedent.

In any event, the binational panel in *Softwood Lumber* disavowed any conflict with the Federal Circuit's decision in this case. According to the panel, its "holdings are consistent with the determination of the Court of Appeals for the Federal Circuit in *Timken* and *Corus Staal*." Pet. App. 101a. The panel reasoned that the court of appeals' decision in this case did not control the outcome in *Softwood Lumber* because the Federal Circuit had relied upon "the preclusive effect it found in various features of the URAA, most particularly * * * 19 U.S.C. § 3533; § 3538," which establish "specific statutory procedures for determining whether the United States will implement WTO DSB decisions." Pet. App. 104a. While recognizing the importance of the WTO process and the statutory process for ensuring consultation within the political branches regarding whether and how to implement any WTO report, see Pet. App. 104a-109a, the binational panel reasoned that the question presented before it was different because "[i]n *Softwood Lumber*, the Section [3533]/Section [3538] process has run its course," and USTR had directed the Department of Commerce to issue a determination not inconsistent with the WTO report concerning *Softwood Lumber*. Pet. App. 109a. Plainly, then, by its own terms, the binational panel did not purport to make any determination about the interaction of *Chevron* deference and the *Charming Betsy* canon with respect to facts such as those presented in this case, in which the international

dispute resolution mechanism and statutorily dictated process for deciding whether and how to implement the WTO outcome, if necessary, has yet to take place.[9]

4. Finally, contrary to petitioners' assertion, the decision below does not conflict with the decision of any other court of appeals regarding the question whether the *Charming Betsy* canon should be applied to invalidate an agency action that would otherwise be entitled to *Chevron* deference. Indeed, petitioners cite no case in which a court of appeals has struck down an otherwise reasonable agency interpretation of an ambiguous statute on *Charming Betsy* grounds.

Petitioners claim that the court of appeals' opinion below conflicts with the D.C. Circuit's decision in *George E. Warren Corp.* v. *United States EPA*, 159 F.3d 616 (1998), amended on other grounds, 164 F.3d 676 (1999). But that case, which *upheld* an agency's discretion to take a WTO report into account in construing the relevant statute, presents no conflict with the court of appeals' ruling in this case. In *Warren*, the WTO issued an adverse opinion with respect to an Environmental Protection Agency (EPA) rule. 159 F.3d at 619. Pursuant to 19 U.S.C. 3533, the USTR "advised the WTO that the United States intended to comply" with the decision. 159 F.3d at 619. The EPA then promulgated a new rule intended to correct the WTO inconsistency. *Id.* at 619-

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[9] In any event, the binational panel's decision in *Softwood Lumber* is not final and, contrary to petitioners' characterization, does not categorically hold that "zeroing was unlawful under U.S. law." Pet. 16. The Department of Commerce has filed another remand determination in that case, which continues to employ "zeroing," although it does so on a transaction-by-transaction basis, in lieu of the more aggregated product-by-product basis employed in the Department's previous determination.

620. The plaintiffs in *Warren* challenged the EPA's consideration of the WTO report in promulgating its new rule. The D.C. Circuit held that nothing in the text or structure of the statute indicated that "Congress intended to preclude the EPA from considering the effects a proposed rule might have upon the * * * treaty obligations of the United States." *Id.* at 623. The D.C. Circuit's opinion, which *permits* an agency to consider a WTO report when the Executive Branch determines that compliance is appropriate, provides no authority for petitioners' claim that an agency is *required* to amend its practices to conform to a WTO report with which the Executive Branch disagrees.

The decision below is entirely consistent with *Warren*. Petitioners contend otherwise (Pet. 24), asserting that the effect of the court of appeals' decision was to deprive the Department of Commerce "of discretion to interpret the statute in a manner that does not violate U.S. treaty obligations," but the court of appeals held no such thing. To the contrary, in *Timken*, the Federal Circuit specifically concluded that "the statute does not directly speak to the issue of negative-value dumping margins." *Timken*, 354 F.3d at 1342. Plainly, then, the court of appeals did not hold that the statute precludes the Department of Commerce from revising its interpretation of the statute in a manner consistent with WTO rulings.[10]

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[10] Petitioners cite to the court of appeals' discussion of petitioners' argument concerning the "fair comparison" requirement of 19 U.S.C. 1677b(a). See Pet. 24 (citing Pet. App. 7a-8a). Although the court of appeals correctly concluded that the "fair comparison" provision is irrelevant to this issue, because Congress provided an "exhaustive list" of the adjustments necessary to make a "fair comparison" between export price and normal value, see Pet. App. 7a; *Timken*, 354 F.3d at

Finally, petitioners cite *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003), as an example of a recent case in which the "interplay between the *Charming Betsy* rule and *Chevron* analysis has already arisen." Pet. 26. Before it even reached the *Charming Betsy* question, however, the Ninth Circuit held that the agency was "not entitled to deference" because its "position is inconsistent with existing [agency] policy and regulations." 346 F.3d at 885. Plainly, then, *Ali* does not support petitioners' argument that an agency's long-standing and otherwise reasonable construction of an ambiguous statute can be invalidated on the basis of the *Charming Betsy* interpretive rule. In any event, this Court overruled *Ali* in *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 125 S.Ct. 694 (2005). The Ninth Circuit thereafter vacated the opinion relied upon by petitioners. 421 F.3d 795, 797 (2005). A vacated opinion, of course, has no precedential effect. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979). Petitioners' claim of a conflict is thus without merit.[11]

1344, that conclusion does not detract from the court of appeals' explicit holding that the statutory definition of "dumping margin" in 19 U.S.C. 1677(35)(A) is ambiguous. *Timken*, 354 F.3d at 1341-1342. Nothing in the Federal Circuit's rationale would prevent the Department of Commerce from taking WTO rulings that construe the Uruguay Round Antidumping Agreement into account in interpreting Section 1677(35)(A).

[11] The other court of appeals decision on which petitioners rely, *Mississippi Poultry Ass'n* v. *Madigan*, 992 F.2d 1359 (5th Cir. 1993), has also been vacated by a grant of rehearing en banc, 9 F.3d 1116 (1993), and replaced by an en banc decision of the Fifth Circuit that makes no reference to the *Charming Betsy* canon of construction, 31 F.3d 293 (1994). See Fifth Circuit Rule 41.3 ("[u]nless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CORUS STAAL BV AND
CORUS STEEL USA INC.,

Petitioners,

v.

DEPARTMENT OF COMMERCE *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF OF PETITIONERS

This case raises issues of fundamental importance to the U.S. economy and its foreign trade relations. Continued use of "zeroing" will cost U.S. businesses and consumers billions of dollars. Pet. at 25. The practice also threatens the nation's status as a trusted treaty partner, by creating disparate understandings of a multi-lateral agreement and risking trans-Atlantic tensions. See Brief of the European Commission as *Amicus Curiae* ("EC Br."). These profound implications of the decision below alone justify review by this Court. Respondents' arguments—most of which flatly mischaracterize petitioners' claims—do not demonstrate otherwise.

Petitioners do not seek to change U.S. law, to give binding effect to decisions of the World Trade Organization ("WTO") or to implement any WTO report. Petitioners argue only that the interpretation of the statutory term "dumping margin" by the Department of Commerce (the "Department") is invalid under U.S. law. Section 3512(c) does not preclude judicial review of this claim, which is why the government waived this argument below. The implementation process of Section 3538(b) likewise does not bar courts from using traditional tools of statutory construction (including the *Charming Betsy* canon) to avoid violations of international agreements that Congress never meant to authorize. Indeed, because it fosters unnecessary frictions with major allies and trading partners, the lower court's dismissive and poorly-reasoned reading of Section 3538(b) is an independent reason for *granting* review, see Pet. at i (third question presented), not a basis for leaving the Agreement-violating practice of zeroing undisturbed.

Nor can respondents defend that practice. The *Charming Betsy* canon plainly applies and renders the Department's statutory interpretation invalid. And a critical distinction the government relied on when it successfully opposed the petition seeking review of *Timken Co.* v. *United States*, 354 F.3d 1334 (Fed. Cir. 2004), no longer applies. The invalidity

of zeroing under U.S. law is itself sufficient to warrant review. And, contrary to respondents' claims, the Binational Panel decision in *Softwood Lumber*[1] creates the functional equivalent of a circuit split. The petition should be granted.

1.a. In their efforts to forestall review, respondents repeatedly mischaracterize the issue in this case. Petitioners have never argued that WTO reports construing the Antidumping Agreement ("AD Agreement") are "binding" on U.S. agencies and courts, "change" the meaning of the Tariff Act, or "prevail" over federal law. See US Steel Opp. at 18; U.S. Opp. at 17. Nor have they argued that those reports *alone* rendered the Department's interpretation of "dumping margin" unreasonable. See U.S. Opp. at 14-15.

Petitioners argue instead that a Department interpretation of a concededly ambiguous statute is unreasonable *as a matter of U.S. law*, because it is inconsistent with *Congress's intent* that the Tariff Act be construed, whenever possible, to comply with the Uruguay Round Agreements. Congress is presumed to intend such compliance under the rule that "an act of Congress ought never be construed to violate the law of nations, if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Here, this presumption is confirmed by Congress's express statements that it enacted the Uruguay Round Agreements Act ("URAA") "to bring U.S. law fully into compliance with . . . those agreements," and expected "implementation of federal statutes consistently with [those] agreements, where permissible under the terms of such statutes." See Statement of Administrative Action ("SAA") at 669-70, Pet. App. 154a-55a.

Petitioners thus bring a standard challenge, under *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), to an agency

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[1] Article 1904 Binational Panel Report, *Certain Softwood Lumber Products From Canada: Final Affirmative Antidumping Determination*, Secretariat File No. USA-CDA-2002-1904-02 (June 9, 2005).

interpretation of an ambiguous statute. Although Congress has not spoken to the precise issue (zeroing), its presumed, as well as expressly stated, intent (compliance with the Uruguay Round Agreements) renders an otherwise permissible agency interpretation unreasonable. Petitioners rely on WTO reports only as evidence that the Department has violated Congress's intent by resolving a statutory ambiguity in a manner that does not comply with the requirements of the AD Agreement.

b. Section 3512(c) does not bar review of this claim. U.S. Opp. at 14. The Federal Circuit rejected this very argument in *Timken*, 354 F.3d at 1341, as did the Court of International Trade ("CIT") below, Pet. App. 25a n.13, and the government waived it on appeal. Brief for Department of Commerce at 31 n.5, *Corus Staal BV* v. *Department of Commerce* (No. 04-1107). In any event, the argument is baseless. Petitioners do not seek to invalidate zeroing because "it is inconsistent with [the AD Agreement]," 19 U.S.C. § 3512(c)(1)(B), but because it is inconsistent with *Congress's intent* that the Tariff Act be enforced consistently with that Agreement. Section 3512(c) plainly does not divest courts of authority to use ordinary U.S. legal rules to determine the validity of agency interpretations of statutes. See *Uzbekistan* v. *United States*, 25 C.I.T. 1084, 1088 (2001) (under Section 3512, parties "are free to argue that Congress would never have intended to violate an agreement it generally intended to implement").

In fact, the U.S. told the WTO that Section 3538(c)(1) of the URAA "does not limit judicial review" of anti-dumping proceedings, and that U.S. courts can use *Charming Betsy* to ensure compliance with the Uruguay Round Agreements.[2] It would have been disingenuous for the government to assure the WTO that Section 3538 permits judicial review if, as it now claims, another provision precluded that very review.

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[2] *United States – Section 129(c)(1) of the Uruguay Round Agreements Act, Second Written Submission of the United States*, WT/DS221, ¶¶ 12, 20 (Mar. 8, 2002) (emphases added) (attached hereto as Reply App. 2a, 6a-7a).

c. Nor do petitioners seek to "usurp the role of the political branches to decide whether and how to implement WTO decisions." US Steel Opp. at 21; see also US Opp. at 15. Petitioners have never sought to implement a WTO report. No WTO report addressed the use of zeroing with respect to petitioners' products until *after* petitioners sought this Court's review. See *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (Oct. 31, 2005). Nor did petitioners seek to implement the decision in *EC – Bed Linen*,[3] which involved zeroing by the European Commission, or *Softwood Lumber*,[4] which involved Canadian lumber. Rather, petitioners cited these decisions only to show what the AD Agreement means, and thus that the Department's construction of the Tariff Act conflicts with Congress's desire to ensure full compliance with that Agreement.

Once the red herring of implementation is swept aside, the deeply flawed nature of respondents' argument—and of the lower court's ruling—is evident. Congress enacted the URAA to ensure full compliance with the Uruguay Round Agreements, and expected agencies to exercise their discretion to comply with those Agreements whenever possible. SAA 669-70, 676, Pet. App. 154a-155a. Yet, according to respondents and the lower court, when the WTO finds that the Department's discretionary action violates those Agreements, the URAA bars courts from even considering whether that action unreasonably deviates from congressional intent.[5]

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[3] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (adopted Mar. 1, 2001).

[4] *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004).

[5] Contrary to the government's claim, U.S. Opp. at 17-18, the lower court plainly foreclosed judicial review of this claim. Citing Section 3538, it refused to consider petitioner's *Charming Betsy* argument on the ground that doing so would invade "the *exclusive province* of the political branches." Pet. App. 10a (emphasis added). This is not merely a refusal

Section 3538(b) does not mandate this absurd result. It says nothing at all about judicial review of agency action, let alone evinces a clear intent to foreclose such review. See Pet. at 27-28. To the contrary, Congress contemplated that a change in law necessary to comply with an adverse WTO ruling could be effectuated through "judicial action." SAA at 1033, Pet. App. 157a. In fact, the U.S. has advised the WTO that implementation decisions under Section 3538 "*do[] not limit judicial review*" of antidumping proceedings, and that such decisions do not preclude the Department from "'chang[ing] its interpretation of U.S. law . . . *as a result of a direction from a U.S. court.*'" Reply App. 7a & n.16 (emphasis added).

Thus, it cannot "thwart Congress' entire statutory scheme," US Steel Opp. at 21, for courts to look to WTO reports when they apply ordinary tools of statutory construction to determine the validity of an agency interpretation of ambiguous law. Tellingly, respondents nowhere explain why, in a statute designed to ensure full U.S. compliance with the AD Agreement, Congress disabled courts from using such tools to avoid unintended violations of that Agreement and the international frictions such violations cause. By contrast, permitting courts to rely on WTO reports when employing the *Charming Betsy* canon does not rob Section 3538(b) of its purpose or "strip" the political branches of powers conferred by that provision. U.S. Opp. at 17. The political branches must still address *unavoidable* conflicts (*e.g.*, where Congress *requires* action deemed violative of the Agreements) and in those cases will decide whether and if so how to implement a WTO ruling.

In short, the lower court plainly erred in ruling that Section 3538(b) precludes review of petitioners' *Chevron/Charming Betsy* claim. Nothing in the language or history of that provision overrides the strong presumption in favor of judicial review of agency interpretations of ambiguous statutes—a

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to give WTO decisions "determinative weight," U.S. Opp. at 18, but a ruling that the judiciary lacks authority to hear this legal challenge.

presumption that applies with particular force where, as here, foreclosing review will create international tensions and require the political branches to address international violations Congress never intended to authorize. A contrary reading avoids these anomalies, gives independent meaning to Section 3538(b), and ensures that U.S. trade laws are enforced in accordance with the will of Congress, which speaks on behalf of the U.S. in such matters. Pet. at 28-30.

Indeed, even if the lower court's construction were less clearly wrong, the very question of the proper scope of Section 3538(b) is a profoundly important one that warrants this Court's review. In its terse treatment of the issue, the lower court did not mention the presumption of judicial review, dismissed the international tensions its interpretation will cause as none of its concern, and nowhere addressed the obvious anomalies of that interpretation. Pet. App. 9a-10a. This dismissive and poorly-reasoned "analysis" should not be the judiciary's final word on such an important issue. The European Commission has taken the extraordinary step of urging this Court to address the validity of zeroing under domestic law. If this request is to be rebuffed, it should only be because this Court concludes, after plenary review, that Section 3538 bars courts from ensuring that ambiguous statutes are construed, where possible, consistently with U.S. international obligations.

2. Respondents' defense of zeroing itself fares no better. The government half-heartedly argues that the *Charming Betsy* canon operates only to avoid interference with the prescriptive, or regulatory, authority of other sovereigns and thus has no bearing on the proper interpretation of the ambiguous phrase "dumping margin." U.S. Opp. at 12-13. But in *Weinberger* v. *Rossi*, 456 U.S. 25 (1982), this Court applied the canon to a statute that barred the U.S. military from discriminating against U.S. citizens on U.S. bases abroad. The Court construed this statute narrowly not because a foreign government was regulating the same hiring

practices, but because, as here, a contrary interpretation would violate U.S. obligations under an executive agreement. *Id.* at 31-32. Moreover, in flat contradiction of its claims here, the U.S. told the WTO that the *Charming Betsy* canon ensures that *domestic trade law* is interpreted consistently with the Uruguay Round Agreements where possible. Reply App. 2a.

The canon is not rendered inapplicable because the interpretation at issue is longstanding. *E.g.*, U.S. Opp. at 3, 15 n.7. Agencies can change interpretations of ambiguous statutes, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996), and evidence that an existing interpretation conflicts with an authoritative interpretation of a subsequent executive agreement would provide a basis for doing so. Respondents cite no authority suggesting that the *Charming Betsy* canon does not or should not apply in such circumstances.[6]

Finally, the fact that this Court declined review in *Timken*, U.S. Opp. at 18, is irrelevant. In opposing review in that case, the government argued that the WTO reports Koyo cited were "not . . . an adequate basis for overturning" the Department's interpretation because those reports "*addressed a different type of administrative proceeding* [*i.e.*, an "administrative review" rather than an "investigation"] *governed by a different provision of the Anti-Dumping Agreement.*" Brief for the United States in Opposition at 13, *Koyo Seiko Co., Ltd.* v. *United States*, No. 04-87 (U.S. Sept. 2004) ("*Koyo* Opp.") (emphases added).[7] This case involves an investigation, the

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[6] Nor is zeroing needed to prevent "masked" dumping. *See* U.S. Opp. at 15 n.7; US Steel Op. at 4. Another provision of the Tariff Act expressly addresses this very concern. *See* 19 U.S.C. § 1677f-1(d)(1)(B).

[7] *See also Koyo* Opp., at 14 (WTO reports Koyo cited were "not sufficiently on point to provide a basis for overruling" Department's interpretation); id. at 15 (WTO has noted the "possibility that . . . 'zeroing' may be permissible in the context of an administrative review"); *id.* at 16 ("the WTO has not yet addressed the practice of 'zeroing' in administrative reviews").

very type of proceeding at issue in the WTO reports on which petitioners rely. Moreover, *Timken* did not address the URAA's implementation procedures, see 354 F.3d at 1345, and thus did not present the question whether Section 3538 precludes judicial review of a *Charming Betsy/Chevron* claim.

3.a. Ultimately, respondents ask this Court to ignore the Agreement violation caused by the Department's interpretation because there is no split among the circuits. But this Court often reviews Federal Circuit decisions where, as here, that court's jurisdiction is exclusive and the issue is important.[8] And the validity of zeroing under U.S. law is a vitally important issue.

The practice not only has an enormous impact on the U.S. economy, Pet. at 25, it "pose[s] a threat to relations between the United States and other countries." EC Br. at 2. Four separate WTO reports (three involving the U.S.) have held that zeroing violates the AD Agreement, yet the Department adheres to the practice and the Federal Circuit refuses even to consider whether Congress intended to authorize this violation. By contrast, European courts have used their version of the *Charming Betsy* canon to avoid WTO violations when interpreting laws that, like U.S. law, bar private enforcement of the Agreements and accord deference to agencies implementing them. *Id.* at 18-19. Thus, the U.S. violation of the AD Agreement results from inconsistent *judicial* decision-making under parallel legal regimes. It is therefore essential that this Court grant the petition and ensure that U.S. courts discharge their traditional duty of harmonizing ambiguous statutes with international law so the U.S. can "have a role as a trusted partner in multilateral endeavors." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

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[8] *See, e.g.*, *Merck KGaA* v. *Integra Lifesciences I, Ltd.*, 125 S. Ct. 2372 (2005); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003).

b. In this case, moreover, the Binational Panel decision in *Softwood Lumber* creates the functional equivalent of a circuit split. Contrary to respondents' claims, a Binational Panel does not "replace" the CIT or operate as a U.S. district court. U.S. Opp. at 20. Under the North American Free Trade Agreement ("NAFTA"), Panel review "replace[s] *judicial review*," Art. 1904(1), 32 I.L.M. 612, 683 (1993) (emphasis added), and Panel decisions, unlike those of the CIT or district courts, are not subject to appellate review, except in narrow situations not relevant here. 19 U.S.C. § 1516a(g)(2)-(4). Moreover, NAFTA and its implementing statute do not state that Panels are "bound" by Federal Circuit decisions, but only that they may "*rely on*" "relevant . . . judicial precedents to the extent that a court . . . would." NAFTA, Art. 1904(2), 32 I.L.M. at 683 (emphasis added).[9] This provision treats Panels like circuit courts, which may "rely on," but are not bound by, precedent from other circuits.

The importance of the conflict between the Panel and Federal Circuit decisions is not lessened by the non-precedential nature of Panel decisions or petitioners' ineligibility for Panel review. U.S. Opp. at 19-20. What matters is that a statute has been given different meanings in two different proceedings.[10] Respondents make much of the Panel's observation that the Section 3538 implementation process had run its course in that case but not this one, *id.* at 21; US Steel Opp. at 16, but they nowhere explain how the meaning of "dumping margin" can depend on whether the U.S. has implemented a WTO report. That statute either permits zeroing (because courts can ignore *Charming Betsy* and Congress's desire for full compli-

[9] The fact that several Panels have deemed themselves bound, US Steel Opp. at 14-15, is irrelevant. NAFTA says no such thing, and individual Panel decisions do not bind other Panels. *See* U.S. Opp. at 19-20.

[10] Contrary to the government's claim, U.S. Opp. at 21 n.9, the Panel categorically ruled that, under the *Charming Betsy* canon, zeroing is "not in accordance with law." Pet. App. 120a. The Department's use of a different type of zeroing on remand in that case simply highlights its intransigence, not any qualification in the Panel's ruling.

ance with the AD Agreement) or it does not (because *Charming Betsy* and congressional intent bar the practice).

Moreover, petitioners have shown that the Federal Circuit has foreclosed use of the *Charming Betsy* canon, regardless of whether implementation has occurred. First, the court ruled that the statute's specification of factors to be weighed in assessing dumping margins prohibits use of the canon, Pet. at 17-18.[11] Second, implementation decisions will not address how duties already imposed under Agreement-violating dumping orders should be treated. Because the treatment of such previously-imposed duties raises the same "foreign policy implications" that, according to the lower court, bar use of the *Charming Betsy* canon, implementation decisions will not remove that bar. *Id.* at 19.

Finally, the Binational Panel decision in *Softwood Lumber* cogently explained the logical fallacy in the Federal Circuit's conclusion that authoritative interpretations of the AD Agreement cannot be used when determining the validity of an agency's interpretation of an ambiguous statute under *Charming Betsy*. *Id.* at 16-17; EC Br. at 12-14. Respondents offer no response to the Panel's analysis, because there is none. The purposes of "percolation"—of allowing further consideration of issues by lower tribunals—have now been fully served. The Panel decision has exposed the deep flaws in the Federal Circuit's reasoning, and no other lower court can address the validity of zeroing under U.S. law.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[11] This analysis, moreover, squarely conflicts with the D.C. Circuit's reasoning in *George E. Warren Corp.* v. *U.S. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds by* 164 F.3d 676 (D.C. Cir. 199). *See* Pet. at 23.

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APPENDIX

APPENDIX A

UNITED STATES – SECTION 129(c)(1) OF THE URUGUAY ROUND AGREEMENTS ACT

(WT/DS221)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

March 8, 2002

* * * *

Canada Has Failed to Establish that Section 129(c)(1) of the URAA Mandates a Breach of U.S. Obligations Under the AD Agreement, the SCM Agreement, or GATT 1994

* * * *

B. The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying U.S. Principles of Statutory Interpretation

10. The United States has argued at length in its first written submission, in its oral statement at the first Panel meeting, and in its answers to the Panel's questions, that section 129(c)(1) does not breach WTO rules because "prospective" implementation in WTO disputes involving anti-dumping and countervailing duty measures requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date of implementation. However, even if Canada were correct in arguing that date of entry is not the controlling issue, section 129(c)(1) can violate WTO rules only if it *mandates* the actions that Canada alleges. If it does not do so, then Canada's claims must fail, regardless of what it means to implement a new determination in a WTO-consistent manner.

11. It is well-established that municipal law consists not only of the provisions being examined, but also domestic

legal principles that govern the interpretation of those provisions.[8] While the Panel is not bound to accept the interpretation presented by the United States, the United States believes that the Panel should give considerable deference to the United States' views on the meaning of its own law.[9]

12. For purposes of ascertaining the meaning of section 129(c)(1) as a matter of U.S. law, U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States."[10]

C. Canada's Arguments Fail to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules

13. Canada makes a number of arguments regarding why section 129(c)(1) allegedly breaches various provisions of the AD Agreement, the SCM Agreement, and GATT 1994. Each of the arguments is a variant on a common theme, and each arises from a common assumption. To quote Canada's response to a question from the Panel:

> The language of section 129(c)(1), by limiting compliance to future entries, has the effect of precluding the

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[8] *See, e.g.*, Panel Report on *United States – Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 ("*U.S. 301*").

[9] *U.S. 301*, para. 7.19.

[10] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (Exhibit U.S.–11); and *U.S. 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

> Department of Commerce from taking action to comply with the DSB ruling with respect to prior unliquidated entries. As Canada understands U.S. law, section 129(c)(1) would be interpreted this way because otherwise the express limitation to future entries contained in that section would be meaningless. The language of section 129(c)(1) precludes the Department of Commerce from applying the determination to prior unliquidated entries.
>
> Since Section 129(c)(1) directs the Department to apply a new WTO-consistent determination to all unliquidated entries entered on or after a particular date, section 129(c)(1) precludes the Department of Commerce from applying the new determination to unliquidated duties made prior to the particular date. That is, the use of the word "after" in section 129(c)(1) excludes any interpretation that would allow the Department of Commerce to apply the new determination to prior entries. Thus, by virtue of U.S. statutory interpretation and administrative law principles, the Department is precluded from applying the new determination to prior unliquidated entries.[11]

14. Canada's assumption, however, is not correct. Canada's error arises from a mistaken interpretation of the term "determination" as that term is used in section 129(c)(1). As the United States explains below, when the term is properly understood, it becomes clear that Canada's claims and arguments do not establish that section 129(c)(1) mandates WTO-inconsistent action.

15. Section 129(c)(1) states in its entirety:

> (c) *Effects of Determinations; Notice of Implementation.*—
>
> (1) *Effects of determinations.*—Determinations concerning title VII of the Tariff Act of 1930 that are imple-

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[11] Canada's Responses to Questions, paras. 48, 49.

mented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

16. As the text demonstrates, the scope of section 129(c)(1) is actually quite limited. It only addresses the treatment of entries that take place on or after the date of implementation, and even then, it only addresses the application of the *particular determination issued under the authority of section 129(c)(1)* to those entries. It does not address what actions Commerce may or may not take in a *separate* determination in a *separate* segment of the proceeding (*i.e.*, any separate review of the order), and thus does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding.[12]

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[12] Section 351.102 of Commerce's regulations defines a segment of a proceeding as follows:

(1) *In general.* An antidumping or countervailing duty proceeding consists of one or more *segments*. "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.

(2) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

17. As the United States discussed in response to question 46 from the Panel, this point can be illustrated by considering the case of a challenge to a Commerce Department final dumping determination in an investigation. If the challenge were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination.[13] It would then apply that new determination by setting a new cash deposit rate, which would apply to all entries that took place on or after the implementation date. It is this new determination that is the "determination" referenced in section 129(c)(1).

18. If a company were then to request an administrative review of what Canada terms "prior unliquidated entries," Commerce would conduct the administrative review and issue a new determination. Since the administrative review determination would not be the "determination implemented under section 129(c)(1)," nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent

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[13] Section 129(c)(1) does not preclude USTR from directing implementation prior to the end of the reasonable period of time, and it does not preclude Commerce from implementing within the reasonable period of time. In both applications of section 129(c)(1) to date, USTR has directed implementation, and Commerce has implemented, before the end of the reasonable period of time. *See United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000, paras. 4, 8, 10 (explaining that USTR issued its request in the *DRAMS* case on August 2, 1999, that Commerce issued its new determination on November 4, 1999, and that the reasonable period of time expired on November 19, 1999) (Exhibit US-12); *see also* Exhibit US-9 (explaining that USTR issued its request in the *Stainless Steel* case on April 18, 2001 and that Commerce issued its new determination on August 28, 2001); *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Agreement Under Article 21.3(b) of the DSU*, WT/DS179/5, 1 May 2001 (explaining that the reasonable period of time in the *Stainless Steel* case expired on September 1, 2001) (Exhibit US-13).

methodologies in the administrative review.[14] Canada is simply wrong to claim that section 129(c)(1) would preclude Commerce from doing so.

19. The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.

20. Canada has not challenged an actual application of section 129(c)(1) in such a scenario, and Commerce has not addressed such a scenario to date. The only impact of section 129(c)(1), however, is that Commerce would not determine the fate of those pre-implementation entries *in the revocation determination itself.* Section 129(c)(1) does not require Commerce to apply duties to those entries,[15] it does not limit Commerce's discretion in deciding how to administer the law

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[14] As Canada argued in the first Panel meeting:

> [t]he law applied [in an administrative review] is the law as interpreted by the Department of Commerce *at the time that it makes its administrative review decision. The Department of Commerce's interpretation may be quite different from the interpretation it originally applied in the original investigation or in previous administrative reviews.* Examples are instances in which a U.S. court has held that the Department of Commerce's interpretation of the law is incorrect or where the Department of Commerce has decided that a different interpretation of the law is more appropriate.

See Canada's Oral Statement at the first Panel meeting, para. 11 (emphasis added).

[15] Even the SAA states only that the entries "would remain subject to potential duty liability." SAA at 1026.

in separate segments of the proceeding with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings.[16] Accordingly, section 129(c)(1) does not mandate a breach of any of the provisions of the AD Agreement, the SCM Agreement, or GATT 1994 that Canada cites.

21. Since section 129(c)(1) does not mandate any particular treatment of what Canada terms "prior unliquidated entries" in any determination other than the particular one that is issued under its terms, section 129(c)(1) could *mandate* a breach of WTO rules only if the AD Agreement, the SCM Agreement, or GATT 1994 contained an affirmative obligation for Members to ensure that any implementation of adverse DSB recommendations and rulings applied to both pre- and post-implementation entries. None of the Agreements contains such an obligation; none of the Agreements even addresses what constitutes proper implementation in WTO disputes. The only agreement that *does* address a Member's implementation obligations is the DSU, and Canada has declined to pursue any DSU claims. Under the DSU, a Member's implementation obligations are prospective only.[17]

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[16] In response to the Panel's questions, Canada admitted that section 129(c)(1) would *not* violate WTO rules if Commerce "change[d] its interpretation of U.S. law for other reasons, notably as a result of a direction from a U.S. court." *See* Canada's Responses to Questions, para. 54. It also admitted that section 129(c)(1) "would not prevent a U.S. court from directing the Department of Commerce to change the basis on which it made definitive determinations . . . ." *See id.*, para. 51.

[17] The United States discusses below why, contrary to Canada's repeated assertions, it is in fact seeking through this dispute to establish a right of retroactive relief in cases involving antidumping and countervailing measures.

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No. 05-364

In the Supreme Court of the United States

CORUS STAAL BV AND
CORUS STEEL USA INC.,

Petitioners,

v.

DEPARTMENT OF COMMERCE, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE EUROPEAN COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae, the European Commission ("Commission"), is the executive and administrative body of the European Community ("Community"), which at present comprises 25 Member States. As the "guardian" of the treaty establishing the European Community, the Commission is charged with developing and enforcing Community-wide legislation spanning a broad range of subject matters, including foreign trade. The Commission is also responsible for representing the Community before the European, Member State, and foreign courts, putting forward its view of Community law, including the international agreements concluded by the Community. Art. 211 EC Treaty (consol. version), 2002 OJ, C 325/33, at 119-120. Furthermore, the EC Treaty lays down the Community's common commercial policy in Article 133, including anti-dumping matters. Art. 133 EC Treaty (consol. version), 2002 OJ, C 325/33, at 90-91. According to longstanding case law of the European Court of Justice, the common commercial policy is the exclusive competence of the Community. Opinion 1/75, 1975 ECR 1355.

The Commission has a strong interest in having this Court grant certiorari in this case, in light of the potentially wide-ranging negative repercussions of the Federal Circuit's decision. The court below affirmed a U.S. Department of Commerce ("Department") practice, zeroing, that results in an unequal playing field between foreign trading partners. In so holding, the Federal Circuit adopted an approach that, in the view of the

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, the *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

Commission, dangerously understates the role of the judiciary in interpreting ambiguous domestic law to be consistent with international treaty obligations. If the Federal Circuit's decision stands, its acceptance of zeroing and its dismissive approach toward international obligations could pose a threat to relations between the United States and other countries, as well as create disparate approaches in countries governed by a single treaty.

STATEMENT

A. The Underlying Facts

This case is about a practice known as "zeroing," a methodology that has repeatedly and expressly been found to be inconsistent with international law.[2] In the United States, the Tariff Act of 1930 is the statutory framework under which antidumping duties are imposed on foreign merchandise. Duties are applied whenever the foreign merchandise is being "dumped" in the United States, meaning that the merchandise "is being, or is likely to be, sold in the United States at less than its fair value," resulting in "material injury" to a U.S. industry. 19 U.S.C. § 1673.

In determining antidumping duties, the Department calculates an intermediate "dumping margin," which is the amount by which the price at which merchandise is sold in the exporter's home market ("normal value") exceeds the price at which merchandise is sold in the United States ("export price"). 19 U.S.C. §§ 1677b(a), 1677(35)(A). The Department then calculates a

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[2] Although we will refer simply to "zeroing" in this brief, there is a technical distinction – irrelevant to this case but relevant elsewhere – between the type of zeroing used by the Department in this case (so-called "model zeroing") and other forms of zeroing. The type of zeroing at issue in this case and in all of the reports of multinational bodies referred to in the certiorari petition is model zeroing. The European Community itself once applied model zeroing, but it has abandoned that practice entirely following the *Bed Linen* report partially reproduced at Pet. App. 136a-149a.

"weighted average dumping margin," which is the percentage determined by dividing the aggregate of the intermediate dumping margins for a specific exporter by the aggregate export prices and constructed export prices for that exporter. *Id.* § 1677(35)(B). Where the aggregate of the export prices is *lower* than the normal value of the merchandise, a *positive* weighted average dumping margin is determined, and antidumping duties are imposed on this basis.

The Department engaged in zeroing when calculating dumping margins for Corus Staal, a Dutch manufacturer of steel and other products. Several of Corus Staal's U.S. export sales involved prices *higher* than normal value, as opposed to prices *lower* than the normal value, generating an intermediate *negative* "dumping margin." Rather than calculate the aggregated weighted average dumping margin using in full all comparable export prices – that is, all intermediate dumping margins, both positive and negative – the Department selected only the positive intermediate dumping margins, effectively assigning a value of *zero* to all negative intermediate dumping margins. The result is an artificially inflated weighted average dumping margin, one that does not take into account the actual, higher export prices. Indeed, the inherent bias created by zeroing may generate dumping margins where none would have otherwise existed. See Pet. 8.

B. The Decisions of the Courts Below

Petitioner challenged the Department's zeroing methodology as an unreasonable interpretation of the applicable U.S. statute, 19 U.S.C. § 1677b(a). Petitioner contended that the terms used in that statute must be given meaning by reference to the international agreement they were designed to implement, the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade* ("Antidumping Agreement" or "Agreement").[3] The Antidumping Agreement is part of the

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[3] Marrakesh Agreement Establishing the WTO, Annex 1A (Apr. 15,

Uruguay Round Agreements that established the World Trade Organization ("WTO").

Petitioner did not seek to invalidate 19 U.S.C. § 1677b(a) or any other U.S. statute. Furthermore, petitioner did not seek to give binding effect through the U.S. courts to any determination of an international body interpreting the Antidumping Agreement.[4] Rather, petitioner advanced the modest position that in *interpreting* 19 U.S.C. § 1677b(a) – and in deciding whether the agency's interpretation of that statute is a *reasonable* one passing muster under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) – courts should reject as unreasonable (so that it fails *Chevron* deference) an interpretation of an ambiguous U.S. statute if the interpretation creates a violation of the WTO Antidumping Agreement and an alternative interpretation would not. Petitioner invoked the *Charming Betsy* canon of statutory interpretation, which states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

The Court of International Trade applied *Chevron*'s two-step framework, first considering whether Congress had spoken to the precise question at issue and second considering whether the agency's interpretation was a reasonable resolution of statutory ambiguity. At step one, the court firmly rejected the Department's position that the statute *mandates* zeroing. Pet. App. 22a-24a. The court next addressed petitioner's argument

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1994), *reprinted in* 1 H.R. Doc. 103-316 (1994).

[4] Under Article 17.14 of the WTO's Dispute Settlement Understanding (see http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm), once the Dispute Settlement Body adopts Panel and Appellate Body reports – that is, once such reports are unconditionally accepted by the parties to the dispute – they are binding in international law.

that "Commerce's zeroing methodology is unreasonable because it violates the WTO Antidumping Agreement," *id.* at 25a.

The Court of International Trade expressed skepticism about zeroing. "The court is * * * wary of a methodology that intentionally minimizes the impact of nondumped transactions by manipulating the data of potentially equalizing sales." Pet. App. 27a. Disagreeing with the reports adopted by the WTO Dispute Settlement Body, the court perceived "technical[]" and "minimal[]" compliance with the literal words of the Agreement, however. *Ibid.* (emphasis omitted). The court next considered the decision of the WTO Appellate Body in the *Bed Linen* case, Pet. App. 136a-149a, which confirmed that zeroing violates the Antidumping Agreement. Although "[t]his case is * * * similar to *Bed Linen*," Pet. App. 28a, the court "conclude[d] that it cannot solely rely upon a non-binding interpretation of an international agreement as grounds to strike a United States agency interpretation of a statute," Pet. App. 29a-30a, and should "defer to Commerce's interpretation," *id.* at 30a.

The Federal Circuit affirmed. Although petitioner's argument was that the *Charming Betsy* doctrine required the court to reject as *unreasonable* (at *Chevron* step two) an interpretation of an *ambiguous* statute if the interpretation violates a *treaty*, the court of appeals characterized petitioner's argument as being that "Commerce's zeroing methodology violates the United States' obligation to interpret section 1677(35) to conform to *[WTO] decisions* prohibiting zeroing." Pet. App. 4a-5a (emphasis added). As so recharacterized, the argument was easy to reject, because "Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law." Pet. App. 5a.

The court of appeals cited Section 102(a) of the URAA, 19 U.S.C. § 3512(a), for the proposition that the Antidumping Agreement may not "trump[] domestic legislation." Pet. App. 8a-9a. "If U.S. statutory provisions are inconsistent with GATT or an enabling agreement, it is strictly a matter for Con-

gress." *Id.* at 9a. Proceeding as if petitioner had asked it to invalidate *an Act of Congress* – and not an agency interpretation of an ambiguous statute – the court therefore "accorded no deference to the cited WTO cases" and explicitly "reject[ed]" the *Bed Linen* decision. *Ibid.* The court also acknowledged the WTO Appellate Body's *Softwood Lumber* decision, *id.* at 121a-135a, which had applied to the *U.S.* practice of zeroing the same reasoning used in *Bed Linen* to invalidate the *EC* practice of zeroing. But the court of appeals "reject[ed] *Softwood Lumber* as nonbinding because the finding therein was not adopted [by the Executive Branch] as per Congress's statutory scheme." *Id.* at 9a.[5]

At no point did the court of appeals explicitly consider whether the decisions in *Bed Linen* and *Softwood Lumber* were, though nonbinding on U.S. courts, *persuasive* evidence that zeroing as practiced by the Department is inconsistent with the Antidumping Agreement, so as to render that interpretation of an ambiguous statute unreasonable under *Chevron* step two as informed by application of the *Charming Betsy* doctrine. Instead, the court held that ensuring compliance with the Antidumping Agreement was *entirely* the responsibility of the political branches, with no role for the judiciary. "We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme." Pet. App. 10a.

SUMMARY OF ARGUMENT

The European Community and the United States are parties to the same WTO Agreements. Yet in the United States zeroing

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[5] The statutory scheme to which the court referred was the process in Sections 123 and 129 of the Uruguay Round Agreements Act, 19 U.S.C. §§ 3533 and 3538, for *implementation* of the decisions of WTO reports.

is permissible under the decision below, while it is impermissible in Europe. This anomalous situation in and of itself supports a grant of certiorari.

U.S. law itself is thrown into a state of uncertainty by the decision below. The NAFTA Binational Panel that decided the *Softwood Lumber* case (Pet. App. 96a-120a) and the Federal Circuit each looked at the same doctrines of U.S. law – the *Chevron* doctrine, the *Charming Betsy* doctrine, and the provisions of the URAA that preclude direct effect of the Antidumping Agreement and leave implementation of WTO Appellate Body reports to the political branches. They reached opposite conclusions about whether a tribunal should (in general) consider WTO Appellate Body reports in deciding whether an agency's interpretation of a statute is reasonable despite creating the possibility of a treaty violation. They reached opposite conclusions about whether a tribunal should (in particular) invalidate the Department's interpretation of an ambiguous statute to permit zeroing. Not only does this conflict create undesirable confusion – which only this Court can clear up – about U.S. law, but also it strikes the European Commission that the Binational Panel's reasoning is more faithful to this Court's decisions. In particular, in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 567, 575 (1988), this Court applied the *Charming Betsy* canon to invalidate an agency interpretation otherwise worthy of *Chevron* deference.

The European Court of Justice has applied to WTO Agreements doctrines analogous to the U.S. doctrines at issue here, and has reached the opposite conclusion from the Federal Circuit. "Consistent interpretation" – a European doctrine analogous to the *Charming Betsy* doctrine – has been applied to bring the interpretation of ambiguous national legislation into line with international obligations under the WTO Agreements, even though the European Court of Justice has ruled that in the Community, as in the United States, those agreements may not be given direct effect. The divergence in approach between Euro-

pean courts and the Federal Circuit has disturbing implications for trans-Atlantic balance.

ARGUMENT

From a European perspective, the decision below creates numerous troubling anomalies.

First, it allows the U.S. Department of Commerce to practice a zeroing methodology that is inconsistent with a treaty to which both the United States and those other nations are parties.

Second, it conflicts directly with the decision of a Binational Panel convened under the North American Free Trade Agreement ("NAFTA") that zeroing as practiced by the United States is inconsistent with the Antidumping Agreement. The conflict does not pertain to technical issues about zeroing, but rather to the fundamental question whether the *Charming Betsy* doctrine has any role at all to play within the *Chevron* framework by which U.S. courts decide whether to accept or to overturn agency interpretations of ambiguous statutes. The existence of two irreconcilable decisions addressing the very same *U.S.* authorities (*Charming Betsy* and *Chevron*), as applied to the same subject matter (zeroing), is entirely unsatisfactory from the standpoint of nations that must comply with the same treaties that bind the United States, and companies such as petitioner that must comply with U.S. law in their international commercial dealings.

Third, the decision below reflects an approach to treaty obligations entirely incompatible with the way the European Court of Justice approaches the exact same problems. In neither the Community nor the United States is the Antidumping Agreement given direct effect – that is, in Europe as in the United States a domestic court may not *invalidate* domestic legislation for incompatibility with the WTO Agreements, including the Antidumping Agreement. Yet the Community courts understand that they still have a role to play in ensuring the *consistency of interpretation* of domestic legislation with international obliga-

tions in general and the WTO Antidumping Agreement in particular. It is very troubling that in the United States courts should be less vigilant in ensuring such consistent interpretation than the courts of one of its main trading partners.

I. Zeroing Should Not Be Permitted In The United States While Forbidden In The European Community

The European Community and the United States are subject to the same obligations to comply with the Antidumping Agreement. As matters now stand, however, zeroing is impermissible in the Community following the *Bed Linen* report but permissible in the United States, according to the decision below, even after the *Softwood Lumber* report of the Appellate Body.

Both the United States and the European Community are Members of the WTO, an international organization comprising 148 Member countries. The WTO is designed to handle trade disputes, monitor national trade policies, and administer the WTO agreements. World Trade Organization, *at* http://www.wto.org. The Agreement Establishing the World Trade Organization ("WTO Agreement") incorporates various instruments, including the Antidumping Agreement. Both the European Community and the United States are parties to the Antidumping Agreement. Congress adopted the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) ("URAA"), amending the Tariff Act, which now closely tracks the language of the Agreement.[6] The Statement of Administrative Action ("SAA") accompanying the URAA "is an authoritative expres-

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[6] Compare Antidumping Agreement (in calculating dumping margins, a "*fair comparison* [must] be made between the export price and the normal value," Pet. App. 126a (emphasis added)) with Tariff Act, 19 U.S.C. § 1677b(a) (in assessing whether foreign merchandise is being sold, or is likely to be sold, at less than fair value in the United States, "a *fair comparison* shall be made between the export price or constructed export price and normal value") (emphasis added).

sion of the United States concerning interpretation and application of [the WTO Agreements] in any judicial proceeding." 19 U.S.C. § 3512(d). The SAA states that the URAA was "intended to bring U.S. law fully into compliance with U.S. obligations under the [WTO] agreements." SAA, H.R. Doc. No. 103-316 (1994) at 669. This is fully in line with Article 18(4) of the Anti-dumping Agreement, which states that each Member shall "take the necessary steps * * * to ensure * * * the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement."

The Appellate Body of the WTO has found that the "inherent bias" in zeroing "may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[7] In *EC – Bed Linen*, a challenge to the Community's use of zeroing, the Appellate Body concluded that "a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions * * * is *not* a "fair comparison" between export price and normal value."[8] The European Community has since abandoned the practice. Recently, the Appellate Body affirmed that zeroing is inconsistent with the Agreement in a case challenging the United States' use of the practice. In *Softwood Lumber*, the WTO Appellate Body concluded that, by failing to take into account the "*entirety* of the *prices* of *some* export transactions," zeroing "inflates the margin of dumping for the product as a whole."[9]

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[7] Report of the Appellate Body, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, ¶ 135 (Dec. 15, 2003).

[8] Report of the Appellate Body, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/AB/R, ¶ 155 (March 1, 2001) ("*EC - Bed Linen*") (Pet. App. 143a).

[9] Report of the Appellate Body, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R,

Yet the courts below upheld the application of zeroing to goods imported from Europe.

For reasons too obvious to require elaboration, this is a matter of great concern to the Commission. Furthermore, it is the kind of anomaly that has concerned this Court in the past. In interpreting ambiguous treaty language, this Court accords "considerable weight" to the judgments of fellow governments that jointly adopt a treaty with the United States. *Air France* v. *Saks*, 470 U.S. 392, 404 (1985). Foreign constructions of treaty language constitute relevant evidence of the shared understanding of the treaty signatories, and thus may be helpful in maintaining a consistent and coherent international body of law concerning the treaty. See *Olympic Airways* v. *Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting).

II. Two Tribunals Have Construed U.S. Law In Irreconcilable Ways

The NAFTA Binational Panel in the *Softwood Lumber* case confronted essentially the same question that was before the Federal Circuit in this case: whether the *Chevron* doctrine requires acceptance of the Department's position as reasonable in the face of the *Charming Betsy* doctrine and persuasive reports of the WTO Appellate Body confirming that zeroing is inconsistent with the Antidumping Agreement. The Federal Circuit concluded that judicial review of the reasonableness of the Department's position should be conducted in a vacuum, with no effort to avoid the possibility of a treaty violation because the political branches had sole authority over all matters of treaty compliance. The Binational Panel, by contrast, concluded that the Appellate Body reports, though nonbinding in U.S. law, were persuasive. The Binational Panel held that the choice between two interpretations of an ambiguous statute was not strictly one for the Department to make as it saw fit, but rather required

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¶ 101 (Aug. 11, 2004) (Pet. App. 134a) (emphasis in original).

consideration of the *Charming Betsy* doctrine and the need to avoid a conflict with the law of nations. Based on those considerations, the Panel concluded that it is unreasonable to interpret U.S. statutes to authorize zeroing.

The Panel determined that the *Charming Betsy* principle was relevant to its review of an agency's interpretation of an ambiguous statute. As the Panel explained, "*Chevron* is not the only test a court or panel applies in reviewing a challenged agency interpretation of an ambiguous statute. * * * An otherwise permissible agency interpretation (*i.e.*, one that passes *Chevron*) which conflicts with a U.S. international obligation is, absent a clear legislative command, contrary to law." *Panel – Softwood Lumber*, Pet. App. 102a (citing *Charming Betsy*, 6 U.S. (2 Cranch) at 118). Applying that principle, the Panel took into account the WTO Appellate Body's report in *Softwood Lumber*.

The Panel was well aware of the provisions of the URAA that make the Antidumping Agreement non-self-executing, forbid U.S. courts to invalidate statutes based on the Agreement, and leave questions of implementation of WTO Appellate Body reports to the political branches. See Pet. App. 102a-103a. "This Panel clearly lacks the power to directly implement the *WTO Softwood Lumber* Decision or any other decision of the [dispute settlement body]. * * * But the question before this Panel concerns the scope and effect of the *Charming Betsy* doctrine, which is a canon of U.S. law." Pet. App. 103a. Courts and panels have "the ability – indeed the responsibility – to consider WTO obligations in assessing the legality of agency action under *Charming Betsy*. U.S. agencies are bound to *interpret* statutes consistently with U.S. international obligations." *Ibid.* (citation omitted and emphasis added).

The Binational Panel pointed out the logical fallacy of the argument that, because WTO Appellate Body decisions are nonbinding in U.S. courts, they – and the treaty they construe – should be disregarded completely in deciding whether an *inter-*

pretation of an ambiguous statute is rendered unreasonable by the *Charming Betsy* doctrine (Pet. App. 104a (footnote omitted)):

> [T]he relevant international legal obligation * * * is sourced in a treaty, and not in any decision of the [dispute settlement body], and exists before, during, and after completion of the dispute settlement process in the WTO *Softwood Lumber* Decision. The WTO *Softwood Lumber* Decision does not itself cause the challenged United States measure (zeroing) to be in conflict with the Antidumping Agreement or any other international legal obligation of the United States for purposes of *Charming Betsy*. Rather, it establishes with considerable authority that the measure is so in conflict, which makes application of *Charming Betsy* more assuredly correct.

The Panel likewise pointed out the logical fallacy in the argument that, because the URAA precludes giving effect to provisions of the treaty that are "inconsistent with any law of the United States" (19 U.S.C. § 3512(a)), neither the treaty nor authoritative interpretations of the treaty may be invoked to invalidate a mere agency *interpretation* of an ambiguous U.S. statute:

> The challenge here, as was the case in *Corus Staal*, does not involve the application of any "law of the United States." Section 3512(a) deals with statutes, and as such is not directly relevant to this proceeding. * * * [Z]eroing is not mandated by any U.S. statute. Zeroing is a discretionary agency determination which must be consistent with United States international legal obligations in order to be lawful *as a matter of United States law*, unless there is a statutory override of those obligations.

Pet. App. 105a (emphasis added). The Panel added (*id.* at 119a):

> Our decision does not purport to change U.S. antidumping law; rather it applies U.S. antidumping law (as appropriately determined through *Charming Betsy*) to agency action.

> * * * The limitation imposed by Section 3512, of course, only applies to statutes, not to agency action. The URAA does not render *Charming Betsy* unavailable as a rule of statutory construction.

Thus, the Binational Panel considered three sources of *U.S.* law – the *Chevron* doctrine, the *Charming Betsy* doctrine, and the provisions of the URAA that limit judicial power to effectuate the Antidumping Agreement – and reconciled them all. As the Panel determined, it is possible to *interpret* an *ambiguous* statute in conformity with the international treaty obligations of the United States without giving direct effect to the Antidumping Agreement or running afoul of any prohibition of the URAA. Doing so conforms with the *Charming Betsy* doctrine. And doing so does not run afoul of the *Chevron* doctrine, because step two of *Chevron* does not require that agency interpretations of ambiguous statutes be deemed *reasonable* (and thus upheld) when another doctrine of U.S. law renders them *unreasonable* (and thus improper). The decision of the Binational Panel strikes the European Commission as a far more successful reconciliation of these different strands of U.S. law than the decision of the Federal Circuit.

Indeed, it strikes the European Commission that this Court has already indicated that courts in this situation should take the Binational Panel's approach and not the Federal Circuit's approach. In *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U.S. 567 (1988), this Court considered an agency interpretation of an ambiguous statute that would have been, but for the application of other tools of statutory construction, upheld as reasonable under *Chevron*. See 485 U.S. at 574 (citing *Chevron*, 467 U.S. at 842-843 & n.9) ("That statutory interpretation by the Board would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress."). Yet the Court, without dissent, rejected the agency's interpretation precisely because it could not be reconciled with a rule first announced in the *Charming Betsy* case:

> Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804), and has for so long been applied by this Court that it is beyond debate.

485 U.S. at 575 (citation omitted). The principle of constitutional avoidance used to inform the application of *Chevron* in *DeBartolo* was in that case concerned with avoiding problems under the First Amendment to the U.S. Constitution, not with avoiding problems under an international treaty. But Article VI of the U.S. Constitution makes "Treaties," no less than "This Constitution," the "supreme Law of the Land." And that is precisely why the *Charming Betsy* opinion, which discusses avoiding conflict with "the law of nations" and does not otherwise discuss avoiding conflict with the Constitution, is a proper citation for the doctrine of constitutional avoidance. In other words, to treat the *Charming Betsy* doctrine as irrelevant in a *Chevron*-type case involving a treaty – as the Federal Circuit did – but relevant in a *Chevron*-type case involving purely domestic law seems to give the doctrine the least effect in the very context in which it was announced in the first place.

Just last year, this Court observed that the *Charming Betsy* rule "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 124 S. Ct. 2359, 2366 (2004). The application of *Charming Betsy* by the judiciary "helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 2366. In various areas of law this Court "ha[s] recognized the principle that the scope of

generally worded statutes *must* be construed in light of international law." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 816 (1993) (Scalia, J., dissenting) (emphasis added) (citing *Charming Betsy* and other cases).

It therefore strikes the European Commission that the Binational Panel, not the Federal Circuit, has the better of the debate about the degree to which U.S. law requires deference to agency interpretations of ambiguous statutes when those interpretations would raise questions under international treaties. Regardless of whether that conclusion is correct, it is certainly true that two utterly irreconcilable pronouncements on U.S. law now exist from the two bodies with authority to apply U.S. law to international trade disputes of a sort that is of very great interest to the Commission. See Pet. 2-3. The Commission respectfully submits that this Court should resolve the conflict.

III. As European Courts Understand, Treaty Obligations That May Not Be Given Direct Effect May Nevertheless Strongly Inform The Interpretation Of Ambiguous Statutes

The decision of the court below stands in stark contrast to – but the Binational Panel decision comports with – the approach Community courts have followed concerning the relevance of international obligations in the interpretation of domestic statutes.

In Europe, as in the United States, some but not all treaties are self-executing. In particular, just as the URAA rules out "direct effect" for the Antidumping Agreement to overturn a provision of U.S. law, so too in the Community a paragraph of the preamble of the decision approving the Agreement rules out direct effect of the Agreement in the internal legal order of the Community. Decision 800/94, OJ 1994, L 336, last paragraph of the preamble; see Pieter Jan Kuijper & Marco Bronckers, *WTO Law in the European Court of Justice*, 42 COMMON MKT. L REV. 1313, 1314 & n.2 (2005). This was confirmed by the European Court of Justice in Case C-149/96, *Portugal* v.

Council, 1999 ECR I-8395, ¶ 47. In Europe, as in the United States, legislative action has "'transpose[d]' the WTO agreements virtually integrally into" statutory law that courts *are* authorized to interpret. Kuijper & Bronckers, *supra*, 42 COMMON MKT. L. REV. at 1315. Indeed, Member States were obliged to take measures to bring their domestic statutory law into conformity with the WTO Agreements. *Ibid.*

In Europe, as in the United States, case law establishes a doctrine – known as "consistent interpretation" or the presumption against conflict between national and international law – that ambiguous statutes should be interpreted in conformity with the law of nations. As Jennings and Watts put it: "As international law is based upon the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be so interpreted as to avoid such conflict." 1 ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 81-82 (9th ed. 1992). Thus, "where a provision in municipal [*i.e.*, national] law is amenable to different interpretations, it must be construed to conform to international obligations." Patricia Egli & Juliane Kokott, *European Community – WTO Agreements – Effect of International Agreements in European Community Law*, 94 AM. J. INT'L L. 740, 745 (2000). "This principle has also been recognized since the early days of the American Republic by the Supreme Court under the name of the 'Charming Betsy' doctrine, but" – because of the Federal Circuit's decision in this case – "its application to the WTO Agreement is uncertain." Kuijper & Bronckers, *supra*, 42 COMMON MKT. L. REV. at 1316-1317.

In Europe, as in the United States, WTO Appellate Body decisions are not binding beyond the parties to the dispute "and thus have no general application." Kuijper & Bronckers, *supra*, 42 COMMON MKT. L. REV. at 1328. A party that argues that a

European court is *bound* to implement an Appellate Body report therefore would lose the argument.

In Europe, as in the United States, non-judicial governmental bodies charged with the implementation of statutory schemes may be given deference. In the area of anti-dumping law in particular, *amicus* the European Commission always has "broad discretion * * * in such economic matters regarding the interpretation of WTO law when dealing with a complaint. To this end, the [European] Court [of Justice] interprets the WTO law and decides whether the Commission could have reasonably come to its interpretation of the law." Kuijper & Bronckers, *supra*, 42 COMMON MKT. L. REV. at 1324. In other words, a doctrine much like *Chevron* deference applies to interpretation of the European legislation that is the counterpart to the URAA.

The European Court of Justice, like the Binational Panel in the *Softwood Lumber* case and the Federal Circuit in the decision below, have had to consider how to apply these doctrines to WTO Agreements. The European Court of Justice has taken essentially the approach of the Binational Panel – requiring that ambiguous statutes be interpreted consistently with the law of nations – and have not deferred to otherwise-authoritative interpretations of domestic law when to do so would raise questions of treaty violations. "With respect to the WTO, the first Court cases which drew a refusal from the Court to contemplate direct effect, also yielded a confirmation of the principle of consistent interpretation." Kuijper & Bronckers, *supra*, 42 COMMON MKT. L. REV. at 1329. For instance, in *Hermès International*,[10] the Court of Justice applied the principle of consistent interpretation in connection with a provision of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). In that case, the Court held that:

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[10] Case C-53/96, *Hermès Int'l* v. *FHT Marketing Choice BV*, 1998 ECR I-3603.

> since the Community is a party to the TRIPS Agreement and since that agreement applies * * *, the courts * * * when called upon to apply national rules * * *, are required to do so, as far as possible in the light of the wording and purpose of Article 50 of the TRIPS Agreement.[11]

The European Court of Justice has reaffirmed this doctrine several times. In *Schieving-Nijstad*[12] and *Parfums Christian Dior*,[13] the Court emphasized that, although the provisions of WTO Agreements "are not such as to create rights upon which individuals may rely directly before the courts" (no direct effect), nevertheless "the finding that the provisions [of a treaty] do not have direct effect in that sense does not fully resolve the problem."[14] Rather, the Court relied on the ruling in *Hermès International* that, under the principle of consistent interpretation, courts in the Community must interpret national laws "as far as possible" in light of the relevant international treaty.[15] In other words, the European Court of Justice has taken exactly the approach that the Federal Circuit refused to take in the decision below – it has recognized that obligations under the WTO Agreements have a significant role to play in determining whether an agency interpretation of a domestic statute (designed to fulfill an international obligation) is a reasonable one that the courts should accept, and that the absence of "direct effect" of those

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[11] *Id.* ¶ 28.

[12] Case C-89/99, *Schieving-Nijstad vof et al.* v. *Groeneveld*, 2001 ECR I-5851, ¶¶ 35, 55.

[13] Cases C-300/98 and C-392/98, *Parfums Christian Dior SA* v. *Tuk Consultancy* v. *BV / Assco Geruste GmbH et al.* v. *Layher GmbH & Co.*, 2000 ECR I-11307, ¶ 47.

[14] *Dior*, ¶¶ 44, 45.

[15] *Dior*, ¶ 47; *Schieving-Nijstad*, ¶ 35.

international obligations is not a reason to disregard the obligations altogether in interpreting statutes.

The Community and its Member States, as well as the United States, chose to transpose the WTO Agreements into "domestic" law without allowing for direct effect. Insofar as such transposition of an international agreement into national law almost inevitably creates ambiguities, it is extremely important that – in the words of this Court – "*courts* [of the United States] should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements," lest the United States jeopardize its status "as a trusted partner in multilateral endeavors." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995) (emphasis added). By insisting that only the political branches, and not the judiciary, have a role to play in ensuring treaty compliance, the Federal Circuit took an approach inconsistent with that principle and with the *Charming Betsy* doctrine. The European Court of Justice, construing Community and Member State law in light of the same non-self-executing treaties the Federal Circuit construed, reached a different conclusion. Such asymmetry between trusted trading partners merits this Court's attention.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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